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ON RECORD

Supreme Court of the United States

OCTOBER TERM, 1944

No. 6[illegible]

THE BORDEN COMPANY, PETITIONER,

vs.

JOSEPH MORELLA, CHARLES J. BURKE, WALTER CROSS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 16, 1944.

CERTIORARI GRANTED JANUARY 2, 1945.

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United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT

JOSEPH BORELLA, CHARLES J. BURKE, WALTER CROSS, WILLIAM L. DEGRAAF, JOHN B. DONEGAN, STANLEY GAYDA, EDWARD GRAMCKO, STANLEY GRZECK, OLE HOFSETH, WILLIAM KAY, ALEXANDER KRUPICA, WILLIAM LENDO, THOMAS LO SASSO, ROBERT A. MARSHALL, WALTER C. MENYHART, JAMES MCCARTHY, MICHAEL NOVEMBER, LEONARD B. QUINN, ANDREW RUEB, THOMAS M. TREACY, and JESUS ECHEVARRIA,

Plaintiffs-Appellants,

against

THE BORDEN COMPANY,

Defendant-Appellee.

Statement Under Rule 13.

This action was commenced by the service of the summons and complaint on February 26, 1943. The answer of the defendant was filed on April 8, 1943.

The names of the original parties were as follows: Joseph Borella, Charles J. Burke, Walter Cross, William L. DeGraaf, John B. Donegan, Stanley Gayda, Edward Gramcko, Stanley Grzeck, Ole Hofseth, William Kay, Alexander Krupica, William Lendo, Thomas Lo Sasso, Robert A. Marshall, Walter C. Menyhart, James McCarthy, Michael November, Leonard B. Quinn, Andrew Rueb, Thomas M. Treacy, on behalf of themselves and on behalf of other employees of the defendant similarly situated. At the trial Jesus Echevarria was added as a party plaintiff, and the action was discontinued as to all parties plaintiff except those specifically named.

Statement Under Rule 13.

There has been no arrest or bail taken or property attached or arrested in this action.

The trial was had on October 19, 1943, before Hon. Edward A. Conger, sitting without a jury.

No question was referred.

Final judgment was entered on February 17, 1944.

Notice of appeal from said final judgment was filed by plaintiffs on February 28, 1944.

Summons.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JOSEPH BORELLA, CHARLES J. BURKE, WALTER CROSS, WILLIAM L. DEGRAAF, JOHN B. DONEGAN, STANLEY GAJDA, EDWARD GRAMCKO, STANLEY GRZECK, OLE HOFSETH, WILLIAM KAY, ALEXANDER KRUPICA, WILLIAM LENDO, THOMAS LO SASSO, ROBERT A. MARSHALL, WALTER C. MENYHART, JAMES MCCARTHY, MICHAEL NOVEMBER, LEONARD B. QUINN, ANDREW RUEB, THOMAS M. TREACY, on behalf of themselves and on behalf of other employees of the defendant similarly situated,

Plaintiffs,

against

THE BORDEN COMPANY,

Defendant.

Civ. 20–425

To the above named Defendant:

YOU ARE HEREBY SUMMONED and required to serve upon Newgrass & Nayfack, plaintiffs' attorneys, whose address

is 350 Madison Avenue, New York City, New York, an answer to the complaint which is herewith served upon you, within twenty (20) days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

GEORGE J. H. FOLLMER,
Clerk of Court.
(Seal)

Dated: February 26th, 1943.

Complaint.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

Plaintiffs, by their attorneys, Newgass & Nayfack, for their complaint, allege:

I. This action is brought to recover from the defendant unpaid overtime compensation, an additional equal amount as liquidated damages and reasonable counsel fees under the provisions of the Act of June 25, 1938, c. 676, 52 Stat. 1069, 29 U. S. C. Sections 201-219, known as the Fair Labor Standards Act, a law of the United States regulating interstate commerce.

II. Jurisdiction is conferred on this court by reason of Section 24 (8) of the Judicial Code, 28 U. S. C. Section 41 (8), which provides that the district court shall have original jurisdiction of all suits and proceedings arising under any law regulating interstate commerce.

10 *Complaint.*

III. Plaintiffs are service and maintenance employees of the defendant at its business building located at 350 Madison Avenue, Borough of Manhattan, City and State of New York, and former service and maintenance employees of the defendant at said building, and have brought this action on their own behalf and on behalf of other employees of the defendant similarly situated.

IV. Defendant is, and at all times hereinafter mentioned was, a foreign corporation organized under the laws of the State of New Jersey, and is and was engaged in doing business in this state and district. The defendant has consented to be sued in this state and district by desig-
11 nating an agent to accept service of process on its behalf pursuant to the laws of the State of New York. All of the acts complained of were transacted by the defendant at defendant's building at 350 Madison Avenue, Borough of Manhattan, City and State of New York, and the employment of the plaintiffs and other employees of the defendant similarly situated, and all records pertaining thereto, were an essential and integral part of the business of the defendant and occurred within the jurisdiction of this court.

V. Defendant is, and at all times hereinafter mentioned was, the owner and operator of a twenty-four story business building located at 350 Madison Avenue, Borough of Manhattan, City and State of New York.

12 VI. At all times hereinafter mentioned the defendant and its subsidiaries occupied approximately seventeen floors of said business building and engaged in interstate commerce and the production of goods for interstate commerce in said building. The business of the defendant and its subsidiaries was conducted on an interstate and international basis and consisted mainly of the production, distribution and sale of fluid, condensed and cassein milk, ice cream, butter, cheese and other products manufactured

from milk, and other products. Said business was managed, operated, directed and controlled by the defendant and its subsidiaries from said business building. The rest of said building was occupied, pursuant to written agreements of lease and otherwise, by numerous persons, firms, partnerships, associations and corporations, a substantial number of whom were engaged in interstate commerce and the production of goods for interstate commerce.

VII. During the period from October 24, 1938 to the date of this complaint, defendant employed plaintiffs and other employees of the defendant similarly situated, in connection with the operation and maintenance of said business building, as porters, elevator operators, watchmen, service and maintenance men. Plaintiffs were engaged in interstate commerce and in the production of goods for interstate commerce in said building during the period aforementioned. The functions performed by said employees were an essential and integral part of the interstate and international business of the defendant and its subsidiaries and the tenants in said building and were necessary for the production of goods in interstate commerce.

VIII. During said period, the defendant employed plaintiffs and other employees of the defendant similarly situated, for work weeks in excess of forty-four hours for the year commencing October 24, 1938; for work weeks in excess of forty-two hours for the year commencing October 24, 1939, and for work weeks in excess of forty hours after October 24, 1940, without compensating them for such excess time at a rate of one and one-half times the regular rate at which they were employed, all of which was in violation of the Fair Labor Standards Act, 29 U. S. C. Section 207.

IX. As a result of the violations by the defendant of the Act as aforesaid, there became due and owing to the

16 *Complaint.*

plaintiffs and other employees of the defendant similarly situated the sum of at least Ten Thousand ($10,000.) Dollars. Plaintiffs are unable to determine the exact amount thereof because of the fact that all records, books and accounts are maintained by the defendant herein.

X. In addition to the amounts due from the defendant to plaintiffs and other employees of the defendant similarly situated, plaintiffs also claim, on their own behalf and on behalf of other employees of the defendant similarly situated, an additional amount equal to the sums due, as liquidated damages, as provided by the aforesaid Act, Section 16 (b) thereof.

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XI. In accordance with the provisions of the said Act, Section 16 (b) thereof, request is hereby made for reasonable counsel fees, interest and costs of the action to be assessed against the defendant.

WHEREFORE, plaintiffs demand judgment against the defendant for all sums which may be found to be due to plaintiffs and other employees of the defendant similarly situated, and for an additional equal amount as liquidated damages and for reasonable counsel fees, interest and costs of this action.

NEWGASS & NAYFACK,
By GEORGE W. NEWGASS,
18 Attorneys for Plaintiffs,
Office & P. O. Address,
No. 350 Madison Avenue,
Borough of Manhattan,
New York City.

Answer.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

The defendant by Milbank, Tweed & Hope and John A. Kelly, its attorneys, answering the complaint herein:

1. Answering Paragraph I of the complaint, admits that this action is brought to recover from defendant alleged unpaid overtime compensation, an additional equal amount as liquidated damages and reasonable counsel fees under the provisions of the Act of June 25, 1938, c. 676, 52 Stat. 1069, 29 U. S. C. Sections 201-219, known as the Fair Labor Standards Act, a law of the United States regulating interstate commerce, but denies that there is any unpaid overtime compensation due the plaintiffs, that plaintiffs are entitled to any additional amount as liquidated damages and that plaintiffs are covered by the provisions of said Act.

2. Answering Paragraph II of the complaint, admits that Section 24 (8) of the Judicial Code, 28 U. S. C. Section 41 (8) confers original jurisdiction on the district court of all suits and proceedings arising under any law regulating commerce without regard to the citizenship of the parties or the sum or value in controversy, but denies that plaintiffs are covered by said Act and that there is any unpaid overtime compensation due to said plaintiffs.

3. Admits the allegations of Paragraph III of the complaint, except that it is without knowledge or information sufficient to form a belief as to the truth of the averment in said Paragraph III that this action is brought on behalf of other employees of the defendant similarly situated.

4. Answering Paragraph IV of the complaint, admits the averments thereof except that it denies that the services performed by the plaintiffs and other employees similarly situated were performed in commerce or the production of goods for commerce, that the plaintiffs and such other employees are covered by the Fair Labor Standards Act, that the defendant violated said Act and that there is any compensation due the plaintiffs and such other employees, and further denies that the employment of the plaintiffs and other employees of the defendant similarly situated, and all records pertaining thereto, were an essential and integral part of the business of the defendant and occurred
23 within the jurisdiction of this court.

5. Answering Paragraphs V and VI of the complaint, admits that at all times mentioned in the complaint it was and now is the owner and operator of a twenty-four story office building located at 350 Madison Avenue, Borough of Manhattan, City and State of New York, and during such times it did occupy and now occupies approximately seventeen floors of said office building; that the business of the defendant was and is conducted on an interstate and international basis and consisted and now consists mainly in the sale and distribution of fluid, condensed and evaporated milk, casein, ice cream, butter, cheese, and other products manufactured from milk, and other products; that the rest of said office building was and is occupied pursuant to
24 written agreements of lease, and otherwise, by numerous persons, firms, partnerships, associations and corporations, and except as herein admitted, denies each and every averment in said Paragraphs V and VI, except that it is without knowledge or information sufficient to form a belief as to whether or not a substantial number of the tenants of the defendant in said office building were or are engaged in interstate commerce and the production of goods for commerce; and it alleges that during all of the times mentioned

in the complaint and at the present time no goods are produced for commerce in said building by the defendant, its subsidiaries or any of the tenants in said building.

6. Answering Paragraph VII of the complaint, admits that during the period from October 24, 1938 to the date of the complaint it employed plaintiffs and other employees of the defendant similarly situated in connection with the operation and maintenance of said office building as porters, elevator operators, watchmen, service and maintenance men, and except as herein admitted denies each and every averment of said Paragraph VII.

7. Answering Paragraph VIII of the complaint, admits that during the period from October 24, 1938 to the date of the complaint the defendant employed service and maintenance employees in said building for work weeks in excess of 44 hours for the year commencing October 24, 1938; for work weeks in excess of 42 hours for the year commencing October 24, 1939, and for work weeks in excess of 40 hours after October 24, 1940, and that except for the period commencing May 1, 1942 it did not pay its service and maintenance employees in said building on a regular hourly rate up to the number of hours set out in the Fair Labor Standards Act and one and one-half times such regular rate for time worked in excess of such hours, and, except as herein admitted, denies each and every averment of said Paragraph VIII, and alleges that neither the plaintiffs nor any other employees of the defendant similarly situated are covered by the provisions of the Fair Labor Standards Act of 1938 and that there is no overtime due them by reason of the provisions of said Act.

8. Answering Paragraph IX of the complaint, denies each and every averment of said Paragraph, except that the defendant is without knowledge or information sufficient to

form a belief as to the truth of the averment that the plaintiffs are unable to determine the exact sum claimed to be due them because of the fact that all records, books and accounts are maintained by the defendant herein, and alleges that the defendant did not violate any terms and provisions of the Fair Labor Standards Act of 1938 and that it has paid the plaintiffs and other employees of the defendant similarly situated in full for all services rendered by them to the defendant.

9. Answering Paragraphs X and XI of the complaint, alleges that neither the plaintiffs nor other employees of the defendant similarly situated are covered by the provisions of the Fair Labor Standards Act of 1938, and that consequently they are not entitled to recover any amount as liquidated damages, counsel fees, interest or costs of the action.

FOR A FIRST DEFENSE, THE DEFENDANT, UPON INFORMATION AND BELIEF, ALLEGES THAT:

10. No one of the named plaintiffs herein is the authorized agent for the purpose of bringing suit to recover alleged unpaid overtime wages under the Fair Labor Standards Act of any other employee employed in said office building by the defendant.

11. The attorneys for the named plaintiffs herein are not authorized by any employee other than the named plaintiffs employed in said building to bring this action.

FOR A SECOND DEFENSE, THE DEFENDANT, UPON INFORMATION AND BELIEF ALLEGES THAT:

12. At all times mentioned in the complaint the defendant was and now is the owner of and operated, maintained and

controlled the office building at 350 Madison Avenue in the City, County and State of New York.

13. During all of the times that the defendant has owned said building, no manufacturing has been done in the building and no goods have been produced for commerce therein.

14. In performing their duties the plaintiffs herein and other employees of the defendant similarly situated were not engaged in commerce, were not engaged in the production of goods for commerce and were not covered by the provisions of the Fair Labor Standards of 1938.

WHEREFORE, the defendant demands judgment dismissing the complaint together with the costs and disbursements of this action.

MILBANK, TWEED & HOPE,
and
JOHN A. KELLY,
By John A. Kelly,
15 Broad Street,
New York, N. Y.,
Attorneys for Defendant.

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Plaintiffs' Exhibit 1.

Deposition of Stephen Everett Wyman.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

Deposition of STEPHEN EVERETT WYMAN, pursuant to stipulation, at Room 1014, 350 Madison Avenue, New York City, commencing on the 29th day of April, 1943, at 2 P. M.

35 PRESENT:

NEWGASS & NAYFACK, Esqs., Attorneys for Plaintiffs GEORGE W. NEWGASS, NATHAN COOPER, and LEO H. HIRSCH, JR., of Counsel

MILBANK, TWEED & HOPE, Esqs., and JOHN A. KELLY, Esq., Attorneys for Defendant
JOHN A. KELLY and GEORGE F. KEENAN, of Counsel

STEPHEN EVERETT WYMAN, Witness.

IT IS HEREBY STIPULATED AND AGREED, by and between the attorneys for the parties hereto, that notice of the taking of this deposition be waived; that the deposition of Stephen Everett Wyman be taken before Bessie M. Schwartz, a
36 Notary Public, at Room 1014, 350 Madison Avenue, New York City, to commence on the 29th day of April, 1943, at 2 P. M.; that all objections as to the qualifications of said Notary be waived; that this deposition may be read in evidence upon the trial of this action regardless of the availability of the witness at such time; that the filing of this deposition be waived; that compliance with Rule 13 of the Local Rules of this Court be waived; that this deposition may be sworn to by the witness before any Notary Public, and that a copy of this deposition shall be delivered to the attorneys for the defendant.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } SS.:

STEPHEN EVERETT WYMAN, being first duly sworn by Bessie M. Schwartz, a Notary Public, testified as follows:

DIRECT TESTIMONY:

Q. What is your full name? A. Stephen Everett Wyman.

Q. Where do you reside? A. 24 Monroe Avenue, East Orange, New Jersey.

Q. What is your occupation? A. Accountant.

Q. Are you an independent accountant or are you employed by some one? A. The Borden Company. 38

Q. Where are you employed? A. 350 Madison Avenue.

Q. How long have you been in its employ? A. 35 years.

Q. Will you tell us what is the nature of your work as an accountant for the Borden Company? A. The issuance of accounting instructions, as pertaining to the Manufactured Products Division of the Borden Company.

Q. Where is your office? A. In this building.

Q. Will you tell us, in detail, what your work consists of for that particular division you mentioned? A. I did tell you.

Q. Do you hold any office with the Borden Company? A. Controller of the Manufactured Products Division.

Q. Will you please explain your duties and the duties of your accounting office in connection with the division 39 that you are connected with? A. The issuance of all accounting instructions to the various factories located throughout the United States with respect to reporting to the home office, 350 Madison Avenue, as to production figures, disbursements, receipts, and the issuance of factory shipped goods through the medium of invoices; instructions pertaining to the deductions that would be made for Federal social security and unemployment insurance, vic-

tory taxes, and the proper method of so reporting through the payroll records; the establishment and perfection of financial statements with respect to the recording of sales, costs of sales, deductions, selling and administration expenses to arrive at net profits; supervision of a staff of traveling auditors to visit each factory for the purpose of internal control; supervision of personnel matters in connection with factory and subsidiary employees; supervision of the entire accounting department at the home office, 350 Madison Avenue. I think that generally covers it.

Q. Are you familiar with the activities of the Borden Company in premises 350 Madison Avenue, New York
41 City? A. The activities of the different departments, yes.

Q. Is it part of your duties as controller to be familiar with the activities of this company? A. No, none other than the accounting part.

Q. Where is your accounting department in this building? A. It is on the eighth, ninth and tenth floors.

Q. What departments or divisions of the Borden Company are in the home office building of the Borden Company at 350 Madison Avenue, New York City? A. We will start in the basement—maintenance and elevator men.

Q. I would like to know what is down there? A. Do you mean in the form of restrooms?

Q. What have you got down in the basement; how is it fitted up? A. We have a boiler room, a rest room, the
42 machinery equipment room.

Q. If that is all there is in the basement, let us go to the ground floor. A. On the ground floor there is the bank, Eastman's, and Stuart, the tailor, the information desk and a cigar counter.

Q. Are there any Borden activities on the ground floor? A. None other than an inquiry desk.

Q. You have a starter there too, have you not? A. As part of the maintenance men.

Q. Please go to the next floor. A. On the second floor we have part of the Casein Division of the Borden Company, and the Borden Company store. I am not in any way describing the tenants on each floor. This is Borden's I am talking about. On the third floor we have the main office of the Casein Division, the National Milk Sugar Department, General Traffic Department, telephone switchboard and operator. On the fourth floor, all sales activities. On the fifth floor, sales activities and legal department. Sixth floor, credit department and mail room. I am not sure whether our label room is down there or not, as we have shifted around so much. Seventh floor, manufacturing departments. Eighth floor, accounting department. Ninth floor, accounting department and income tax division. Tenth floor, account, controller's office and photostat room. Eleventh floor, executive offices. Twelfth floor, general controller (The Borden Company), central transcribing bureau and treasurer's office. The treasurer is on the eleventh floor, but the employees are both on the eleventh and the twelfth due to office supplies as a matter of convenience. Thirteenth, purchasing department. Fourteenth, employee relations department, safety bureau, and stationery department. Fifteenth, special products division (a self-contained unit). Sixteenth, ladies' rest room, general advertising department, bureau of insurance. Seventeenth, Borden's experimental kitchen and Borden's experimental laboratory. Eighteenth, nothing. Twenty-first, real estate department. Nineteenth, department of industry relations.

Q. Is the floor plan that you testified to approximately the floor plan of the Borden Company's activities in this building for the period subsequent to October 24, 1938? A. No.

Q. Are the activities of the various departments and divisions of the Borden Company which you have referred to in your prior answer, the same as the activities which

existed here subsequent to October 24, 1938 to the current date? A. Yes, with the exception of the employee relations and industrial relations departments, which were created in October 1942 and April 1, 1943.

Q. Will you please tell us, in your own words, what the activities of the Borden Company are in premises 350 Madison Avenue, New York City? A. The basement is the office of the maintenance employees and the realty division.

Q. Who is in charge of the office of the maintenance employees in the basement? A. I would rather not answer that question, as I am not too sure.

Q. Are there any other activities in the basement of the
47 building? A. No.

Q. What are the activities of the maintenance employees in the basement of the building? A. I do not care to answer that because I am not altogether sure that my reply would be accurate. Mr. Marshall would be the person to know.

Q. Let's go to the ground floor. A. We have the information desk. On the second floor we have part of the casein division, then we have the Borden's employees' store.

Q. About the casein division—what is actually done by the casein division of the Borden Company on the second floor? A. They handle our advertising, circulars and different formulas in book form for the use of casein products.

Q. Will you tell us what casein products are? A. It is a product made from skim-milk powder.

Q. Do you have a special mailing division down there
48 in connection with the casein business on the second floor? A. Yes.

Q. What is mailed out from those offices of the casein division? A. What I have mentioned.

Q. Do you mail out any samples of casein to consumers? A. No.

Q. You only mail these booklets and brochures? A. Yes.

Q. Can you tell us how casein is used by the public or by manufacturers or people who might be interested in that particular product? A. In the manufacture of plyboard.

Q. Can you list some of the uses of casein? A. Manufactured into a glue which is used in the manufacture of plywood, used for repairing household furniture, etc.

Q. Isn't it used to make fluid milk? A. No. Buttons are made out of casein, combs, hair brush backs, tooth brush holders, handles. It is a plastic.

Q. Will you tell us how casein is sold to the public? How do you get your purchasers of casein? A. Through the medium of advertising.

Q. How do you obtain the list of people to whom you send the advertising material from the casein division of the Borden Company? A. Through advertising medium. They write to us pursuant to an advertisement. 50

Q. What is the form of advertisement that you usually insert in magazines? A. That can be very diversified. We might say: "Are you going to build a boat this summer? Are you going to make a fishing rod? If so, we would recommend the use of Casco cement or casein glue."

Q. The advertisement would state that the information about the casein product can be obtained from the home office? A. No. It would say: "If you are interested in a sample, please communicate with Casein Company, 350 Madison Avenue."

Q. In what publications would these advertisements appear? A. Saturday Evening Post, Popular Mechanics, and that type of magazine; other national periodicals and papers circulated throughout the country, and trade publications. 51

Q. Does the casein division send out samples pursuant to those letters which it receives from these advertisements? A. Yes.

Q. They are sent out from these premises? A. No, from the factories.

Q. Where are these factories? A. One at Bainbridge, New York, and one at Seattle, Washington.

Q. Are these samples sent to people requesting them on a nation wide basis? A. Yes.

Q. How are these samples sent? A. Parcel post, generally, under directions from the home office.

Q. What is the procedure of the casein division with respect to these letters of inquiry which they receive in connection with their advertisements? A. The request for a sample is received by this office and forwarded to one of the casein factories for shipment to the respective customer.

Q. Is the original letter of the customer sent to the factories in Bainbridge or Seattle or does an order go out from
53 this office based on the letters received here asking them to send the samples? Do they confirm at the factory that these samples have been sent to people requesting them? A. The original letter or advertisement placed on a post card and mailed to 350 Madison Avenue does not go directly to the factories, but a sample order form is prepared in duplicate listing the names of the prospective customers requesting samples and this form is sent to the factory. When samples are shipped from a factory to the prospective customers there is a notation made on the original copy that samples have been shipped and the original copy returned to 350 Madison Avenue files.

Q. Are there any other activities of the casein division in addition to what you have just mentioned, regarding orders or sales of casein products? A. You mean with re-
54 spect to their sales? They would be handled exactly the same way.

Q. How would they be handled? A. You take a large plywood manufacturing concern. They would send their order into New York here, unless it were prearranged that there be a stipulated amount to be shipped every week, ten days or once a month. The factory would have a standing order for those shipments. Those contracts wouldn't necessarily have to come through this office. Those contracts

could be made outside the office through contact with the management.

Q. Where you have a standing contract to deliver these goods, wouldn't it have to come through this office? A. No.

Q. What would the salesman do? Would he communicate directly with the factory or advise the home office? A. He would be the top man in the office, or our salesman could make the contacts.

Q. Once he had made the contacts and sold an order for so much casein periodically, would he then communicate directly with the factories in Bainbridge or Seattle or would he advise the New York office in this building, which would then advise the respective factories? A. No, he 56
would send them direct to the factories.

Q. Then the casein division have salesmen operating out of this office in the building? A. I would say yes.

Q. About how many salesmen do they have? A. I couldn't say that.

Q. What part of the casein business done out of this building is regular business of the casein division, as distinguished from the business that you get from time to time from advertisements inserted? A. I wouldn't know that.

Q. Do you know what the volume of business as of the casein division in this building? A. Not offhand. I would have to look up the records. We wouldn't have any way of telling that. 57

Q. Does the casein division have any other offices outside of this building? A. In Seattle and in Bainbridge.

Q. Those offices would be factory offices? A. Yes, and selling organizations.

Q. The office here would be the centralized selling office? A. Yes, this is the main office.

Q. Do instructions to the casein departments outside of this office emanate from this office—running instructions, sales, price policy? A. Price policy, yes.

58 *Plaintiffs' Exhibit 1—Deposition of Wyman.*

Q. Manufacturing instructions? A. Yes.

Q. Does the casein office here have anything to do with the purchase of raw materials for the factories at Bainbridge and Seattle? A. Yes.

Q. Does the casein office in this building have anything to do with the distribution of the products on a nation wide basis or an international basis? A. Yes.

Q. To what extent? A. To the extent of the location of the purchaser as to allocation of orders.

Q. If the sale is made to a new customer who had never been on the Borden books before, where is his credit standing passed upon? A. Here is New York.

59 Q. So that every order comes through New York, no matter where it originates? A. That is right. I will clarify that in this way: We might give a maximum credit allowance to a new customer. We would tell our man in Seattle that we had to look the customer up, and if his credit were all right, we would extend credit.

Q. Who is in charge of the casein division in this building? A. William Callan.

Q. What position does he have with the Borden Company? A. Vice-President.

Q. What percentage of the entire Borden business is the casein division? A. I don't know.

Q. Is it substantial? A. I really couldn't tell you. I couldn't even guess.

Q. Does the casein division in this building do any 60 billing? A. Yes.

Q. Do you do all the billing for the casein products regular business as well as new business? A. I am not quite sure whether we do the billing for Seattle. I think they do their own billing.

Q. How is the billing done—is it done at regular intervals? A. The billing is done subsequent to the date of shipment, at the New York office.

Q. Pursuant to what? A. Pursuant to order received by the New York office from the factory.

Q. At the instruction or direction of the factory after the shipment is made? A. Yes.

Q. Only pursuant to information that this office receives from the factory? A. That is right.

Q. I say factory, because you mentioned that the Seattle office does its own billing? A. That is right.

Q. Isn't it customary for an invoice to be sent to the customer at about the same time that a shipment is made? A. Yes, sir.

Q. Who sends out that? A. The New York office.

Q. Are shipments made from the factories of the casein division across state lines? A. Yes.

Q. Is there any other phase of the casein division that we have not touched upon, that you can recall? I mean, of course, in this building. A. I don't know of any other activity.

Q. Is the advertising for the casein products done in this particular building? A. Yes. That is, it originates in this building.

Q. Is the copy for the advertising written here, too? A. I would say no.

Q. Is it drafted here? A. Yes.

Q. Who writes the copy for the casein division? A. An independent advertising agency.

Q. Is the advertising placed from the office of the casein division in this building? A. Yes.

Q. Who does the drafting of the advertising? A. The president of the casein division, Mr. Callan.

Q. Is the draft copy sent from this building directly to the publications or does it go back to the agency? A. It goes back to the agency.

Q. What is the set-up of the Borden store on the second floor of this building? A. It is an accommodation store for the employees and the tenants of the building.

64 *Plaintiffs' Exhibit 1—Deposition of Wyman.*

Q. Does the Borden Company run the store? A. Yes.

Q. Who is in charge of the store? A. I am.

Q. What products are sold there? A. Milk, hemo, butter and cheese, caramels, malted milk, generally.

Q. Are any products ever shipped from New York State to other states? A. No.

Q. Is it an accommodation only to the employees of the Borden Company in the building? A. Yes.

Q. Where are these products obtained? A. The fluid milk would come from our division of the Borden Company downtown; eggs would come from there; condensed and evaporated milk, cheese, would come from the warehouse on 28th
65 Street.

Q. Do any of these products come from other states to this store in the building? A. They could.

Q. Do any of your plants or factories ship products directly to the company store in this building? A. Offhand, I would say no. We get our entire supply from our warehouse in New York.

Q. Do you know whether any of the products that emanate from the warehouse in New York come from other states? A. Yes.

Q. How many employees are there in the company store? A. Two.

Q. Where is the store? A. In the club room.

Q. Do the maintenance people in premises 350 Madison Avenue have anything to do with the operation of that
66 store? A. No.

Q. Do they clean the premises, in addition to their duties about the building? A. They clean the club room in which the store is located.

Q. Are there any particular maintenance men who have that job? A. I don't care to answer, because I am not sure.

Q. Does the casein division have its own mailing department? A. No.

Q. Who takes care of the mailing? A. Our mail room on the sixth floor.

Q. What are the activities of the Borden Company on the third floor, which you have not mentioned? A. There is the national milk sugar division.

Q. What is that, and what do they do? A. They take the sugar out of skim-milk and make a lactose of it.

Q. Where do they do this? A. At the factories, Penalville, New York, and Bainbridge.

Q. What are the products used for? A. Infant feeding.

Q. Who is in charge of that division? A. Mr. Callan.

Q. Are the activities of the national milk sugar division conducted on the same basis as the casein division, or are there any differences in the operation? A. In general, the same. You have such a dissimilar product that it is not comparable. 68

Q. In other words, orders are received here as a result of advertising prepared here, instructions are sent from the factories to ship products across state lines, and after the products have been shipped and the factory has advised the home office, bills are sent from this office. Is that correct? A. Yes.

Q. Where are payments of bills sent by customers in both casein and milk? A. To this office.

Q. Could you mention some of the consumers of this product? Is the business primarily done with consumers or intermediaries? A. With intermediaries.

Q. To whom do you sell? A. Druggists. 69

Q. As in the case of the casein division, the factories are instructed from this office as to production, procedure, distribution and other matters? A. Yes.

Q. Are there any other activities of the Borden Company on the third floor? A. Traffic.

Q. Will you please explain what these activities are? A. The direction of shipments from the factories to their given location.

Q. Who directs these shipments? A. The traffic manager.

Q. Who is he? A. Ernest T. Hadley.

Q. What is his position with the Borden Company? A. Traffic manager.

Q. Does he occupy any office? A. No, sir.

Q. From what divisions does he receive directions or instructions? A. It emanates from the sales department.

Q. The sales departments of what particular division of the Borden Company? A. From the manufactured products division. We have one over-all company known as the Manufactured Products Division which comprehends casein, national milk sugar and the old Borden Condensed Milk
71 Company. They are, in basis, a separate division. They have their own billing department, accounts receivable, property records, etc.

Q. It covers those four divisions that you mentioned before? A. Yes.

Q. The manufacturing division gives instructions to the traffic manager as to the shipments of these products? A. No, the traffic manager gives instructions to the factories as to how the shipments should go forward.

Q. Will you please explain that in a little greater detail? A. If there is no deviation from regular customers' shipments, the factory has previously received traffic instructions as to the carrier that is to receive the shipment. In the event that a factory's production should change to the manufacture of a different product, traffic instructions as
72 to the routing of the new product will be issued by the traffic department in this building.

Q. Where are these factories located? A. Throughout the United states.

Q. Are these products which are directed to be sent by the traffic manager, sent across state lines? A. You mean the orders? Yes.

Q. Where do these original instructions issue from? A. What instructions?

Q. I assume that a superintendent would ask the traffic manager for instructions as to how to ship merchandise to a new customer. A. That is all routed right here in this office, and appears on the invoices. The original invoice goes to the factory, and on the customer's copy of the original, and subsequent carbon copy, the routing is shown right on the invoice. There is nothing to ask. The superintendent gets it, turns it over to his shipping clerk, it is packed and put on the car of the carrier.

Q. You are talking now of the regular business of directing shipments from this office building? A. Yes.

Q. You mentioned something about new business, where the superintendent of the plant might not know how to ship merchandise to the customer. I am interested in that operation. A. I have answered your second question first, you recall I said that the factories had a defined schedule as to routings on regular orders received, other than from New York.

Q. That would cover new York, too, wouldn't it? A. No, not necessarily. I will tell you why. We have given some of our brokers throughout the country permission to send an order direct to the factory, and the factory has been so notified, and then they have been given a predetermined routing for those orders coming from a certain broker in a certain location.

Q. Those original instructions which are followed by the factory superintendents in the ordinary case, where do they originate from in the first place? A. Madison Avenue.

Q. Another function of the traffic manager is to study freight rates to determine the speediest and most economical method of shipment, and those determine the instructions which he offers to the factory superintendents? A. Yes.

Q. Does the traffic manager check, or does somebody in his division in this building check the various outlines for cost of shipment, that is, freight rates on each shipment. A. Yes.

Q. How many people are employed in this division? A. Maybe 15; I don't know exactly.

Q. What products are covered by the activities of the traffic manager in this building, or affected by the operations of the traffic manager in this building? A. Malted milk, caramels, hemo, casein, milk sugar, mincemeat, condensed and evaporated milk, and prescription foods.

Q. Are these products manufactured in states other than the State of New York? A. Mincemeat, no; milk sugar, no. Those are the only two that are New York State.

Q. Are these products shipped across state lines in substantial amount? A. Yes.

77 Q. What other activities are there on the third floor of this building? A. Telephone and switchboard.

Q. Will you please tell us what this switchboard is for? A. It is for incoming and outgoing calls.

Q. Is that part of the Borden telephonic system in this building? A. We have an inter-office communicating system.

Q. When the Borden Company desires to communicate with its factories all over the nation, does it make its calls through its central switchboard that you have on the third floor? A. In the majority of cases, yes.

Q. Do you have any direct wires to your factories all over the nation on this switchboard, or is it separate? A. There are direct wires from 350 Madison Avenue to the various factories, through the medium of teletype machines 78 located on the 7th floor, Manufacturing Department; 4th floor, Export Department; 15th floor, Special Products Department.

Q. It doesn't clear through that master switchboard, is that correct? A. Yes.

Q. There are no direct wires running from the Borden office in this building to factories, that clear this particular switchboard? A. Yes.

Q. Is there any other activity of the Borden Company on the third floor that you have not mentioned? A. No.

Q. What are the activities of the Borden Company on the fourth and fifth floors of this building? A. Sales activities.

Q. In connection with what are these sales activities done? A. Sales of manufactured products.

Q. What manufactured products do you have in mind? A. Condensed, evaporated and malted milk, hemo, caramels and mincemeat.

Q. What does the sales division do on the fourth and fifth floors? A. It is the sales department.

Q. What is the nature of the sales work that they do? 80
A. The direction of district sales managers and district salesmen, receiving of orders for sales from customers for shipment.

Q. Who are these customers? A. Generally, wholesalers.

Q. Where are they? A. Throughout the United States.

Q. How are the sales operations conducted from this building by your sales office on the fourth and fifth floors? A. An order will come in to the sales department. It is then invoiced to the customer and sent to a designated factory for shipment.

Q. I would like to know the other functions of the sales division. Does it have anything to do with the advertising of the Borden products? A. Yes.

Q. What does it do? A. They handle the advertising of 81
condensed, evaporated, malted, milk sugar and mincemeat.

Q. When you say handle, does copy for advertising originate from those offices? A. In some cases.

Q. Do you have a copywriting staff there? A. I might put it this way, that we have a layout staff.

Q. Who does the approval of the layouts? A. The general sales manager.

Q. What is his name? A. Arthur W. Ramsdell.

Q. Is he an officer of the Borden Company? A. He is vice-president.

Q. Does he employ all the salesmen for the company? A. No.

Q. Where are these advertisements placed after they are approved by Mr. Ramsdell? A. In magazines and periodicals.

Q. What type of advertising is done by this division? A. Primarily, approval of newspaper advertising in defined locations throughout the United States. Also, the working up of an advertising expenditure budget.

Q. Who takes care of the advertising budgets—Mr.
83 Ramsdell? A. Yes.

Q. Do these advertisements contemplate shipments across state lines from your factories and plants, wherever they may be situated? A. Yes.

Q. What other advertising emanates from the fourth or fifth floors in this building? A. The national Elsie advertising campaign.

Q. From whom does it emanate? A. Under the supervision of Mr. Arthur W. Ramsdell.

Q. Are all ideas and thoughts with regard to the Elsie advertising his exclusively? A. Substantially, yes.

Q. Does he prepare the layouts for that advertising in this building? A. Under his supervision.

Q. Are the layouts made here? A. I wouldn't want to
84 answer that surely. I don't know.

Q. In connection with the local campaigns in different parts of the country, are the layouts and the mats prepared here and shipped? A. I don't know.

Q. Who handles the Elsie advertising? A. An independent advertising agency outside of the building.

Q. This Elsie advertising covers many of the Borden products, is that correct? A. Full line products of the Borden Company. Full line products cover all products mentioned before, with the exception of casein and milk sugar.

Q. What other activities does the sales department engage in, in addition to this advertising work? A. The introduction and pushing of full line products and new products.

Q. How is this done? A. By means of campaigns.

Q. What are the media of salesmanship used for the Borden products? A. Campaigns for new products, salesmen contacting the trade for orders.

Q. What part of this function does the sales office or offices in this building serve? A. They have supervision over the number of salesmen in a given district, and approval is also given from this office as to any increase or decrease in the sales staff of a particular district. 86

Q. Where are these sales districts that are under the supervision of this office in this building? A. Throughout the United States.

Q. Are these district managers under the direct supervision and control of the sales division in this building? A. Yes. Under the general sales manager.

Q. How large a staff do you have in connection with your sales division in this building, approximately? A. I don't know, exactly.

Q. Does the sales division in this building plan and decide upon the various types of campaigns to be used and the various parts of the country in which those should be done? A. Yes.

Q. In connection with such campaigns, as well as general advertising, you use local and nation-wide publications and radio? A. No radio. We might use the radio in the west. We haven't in the east. 87

Q. Have you had any radio campaigns, to your knowledge, since October 24, 1938? A. No.

Q. Where are the brochures and campaigns material or sales material prepared? A. In this office.

Q. Do you have a printing office in this building for the preparation of the material? A. No. When you say in this

office, what do you mean by that? The thought is created in this office. The actual production is done outside of this office.

Q. Are layouts and copy prepared by the sales division here for such material? A. I am not entirely sure.

Q. When you say prepared, you only had in mind the thoughts and ideas in connection with the sales campaigns? A. The thought is created here.

Q. You do not know where the printing is done for the material thought up here? A. No.

Q. After the advertising matter, brochures, etc. are printed, are they returned to this office for mailing throughout the country? A. No, it goes direct from the printers, subject to orders sent from here, to where they are wanted.

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Q. Who pays for the printing? A. The Borden Company, from the offices here.

Q. As to the man power for selling purposes, is this the correct description of the structure of your selling department: You have a general sales manager located at 350 Madison Avenue; he appoints the district sales managers and they, in turn, employ the local salesmen? A. Yes.

Q. Do you have any salesmen operating from the offices in this building? A. Yes.

Q. What area do they operate? A. The metropolitan area.

Q. This metropolitan area includes the State of New Jersey as well as the State of Connecticut? A. Yes.

90

Q. How do they operate out of this building? A. They go to consumers and wholesalers, anyone they can sell to. The salesmen operating out of this office are very nominal. I don't think we have very many. We have a district office right here in New York, downtown, which operates independently, the same as Philadelphia, Boston or Detroit.

Q. And you do have salesmen on special items? A. Yes, but they will not cross state lines.

Q. Would these men have anything to do with sales consummated over state lines? A. No.

Q. Would any order come from the States of Jersey or Connecticut to these offices in the Borden Building, at 350 Madison Avenue? A. No.

Q. When these salesmen go to Brooklyn or some borough in the City of New York to sell Borden products, do any of these sales that they consummate in those boroughs contemplate shipment of Borden products over state lines? A. Yes.

Q. To what extent? A. It would be very hard to say. We might have a shipment come direct from one of our factories, across state lines, to one of the A. & P. stores, 92
or we might have that entire shipment from the factory go to the warehouse of the A. & P. over in Jersey City, and they in turn would make their own deliveries to the stores, according to their own requirements.

Q. These shipments that would be made across state lines would be a result of these orders that might be obtained by these salesmen operating from this building? A. Yes, but not the big business; that would come right into this office here.

Q. But a regular business would be done pursuant to that arrangement? A. Yes.

Q. Wouldn't your local salesmen make periodic calls on, say, Seeman Brothers, or Williams or Liggett? A. No, they would come here. They might call about a new prod- 93
uct, but that would be very seldom.

Q. In connection with casein, you said that it was quite common for you to advertise nationally and suggest that people write to this office and request samples. Is that done with other products as well as with casein? A. It might be with a new product.

Q. In your advertisements in trade papers and other periodicals, do you request that orders be sent to this office? A. Yes.

Q. As a result of such advertisements, you receive orders which result in this office directing that shipments be made across state lines? A. Yes.

Q. What activities do you have in connection with your cheese products? A. It is practically the same as on the full line products.

Q. What differences are there in the sales functions of your offices here in connection with your full line products and your cheese products? A. They are substantially the same except in the local advertising end.

Q. In what respects? A. We do not advertise.

Q. Do you have special salesmen for your cheese? A.
95 Yes.

Q. Do they operate out of this office? A. No, they operate through a district.

Q. Under the supervision and control of whom, in this building? A. C. A. Echburg.

Q. What is his connection with the sale of cheese products? A. He is the general sales manager.

Q. Is he also an officer of the Borden Company? A. No.

Q. A director? A. No. He is president of the Borden Cheese Company Division.

Q. Does he have a staff under him in this building? A. Yes.

Q. What do they do in connection with the sale of cheese? A. The same as in the full line.

96 Q. What other activities does the sales division in this building participate in? A. Billing of the customer's order, which is then mailed to the factory for shipment covering full line products. With respect to the cheese operation, the shipment is made direct from the branch to the customer, and shipping instructions are forwarded to this office showing quantities and price, which is then invoiced to the customer.

Q. Do these shipments cross state lines? A. Yes.

Q. Have we covered all the activities of the sales department on the fourth and fifth floors in this building? A. All except export.

Q. Will you please discuss that for us? A. We get an export order and make the shipment.

Q. Where do these export orders come from? A. Panama, Venezuela, Peru, United Kingdom.

Q. Do all the export orders come directly to this office? A. Yes, to the export department.

Q. Pursuant to what? A. Pursuant to various foreign customers.

Q. How are those customers obtained? A. Through brokers in those foreign countries. 98

Q. Do you advertise in foreign countries? A. Yes. It is prepared and directed in this office.

Q. Are mats for foreign advertising shipped from here? A. No.

Q. Do orders for foreign shipments ever go directly from a foreign country to the factory? A. Never.

Q. They go exclusively to this office, and this office directs factories to make shipments to foreign countries, is that so? A. Yes. Invoices are prepared here.

Q. Are payments then sent to the main office in this building? A. Yes. All of the foregoing with reference to foreign shipments is subject to this qualification: Since some time subsequent to October 24, 1938, any orders for shipments to places in the sterling area, which in general 99 is the British Empire, are referred to our wholly owned Canadian subsidiary, and payment is then made to Canada.

Q. What commodities are exported? A. All products.

Q. Have you any idea of the volume of export business? A. I have not. The export sales to countries not in the sterling area fluctuates from month to month and would say that I do not consider it substantial as compared with the total sales dollar value of the Manufactured Products

Division or as compared to the consolidated sales of The Borden Company.

(Examination adjourned to April 30, 1943, at 2 P. M., at the same place.)

Examination continued pursuant to adjournment.

DIRECT TESTIMONY:

Q. Is copy for advertising written here and are layouts for such advertisements prepared here? A. Partially.

Q. Will you please explain? A. The layouts in connec-
101 tion with window displays, counter displays, also suggested ideas as to the national Elsie advertising program.

Q. The layouts are prepared here? A. In the rough.

Q. Where are they sent from here? A. To commercial artists.

Q. In New York City, or across state lines? A. I am not sure about that. I would say in the City.

Q. After these layouts are used for printing purposes, what happens to those layouts? A. They are retained by the printer.

Q. The printed material is used where? A. The window displays would be used in different groceries and super markets; counter displays, the same, and window strips. In general advertising of that type of material and the
102 Elsie campaign advertising, the finished cut would go to the periodical that had national distribution, as the Saturday Evening Post, Liberty, Collier's.

Q. Would any of the printed material that you refer to cross state lines? A. Yes.

Q. They would be distributed on a nationwide basis? A. Which are you referring to?

Q. I am talking about window displays. A. Yes.

Q. And all the printed materials that you mentioned would be sent pursuant to instructions issuing from Mr. Ramsdell of this office? A. Yes.

Q. Will you state how advertisements for local newspapers in various parts of the country are prepared? A. They are prepared by the store in which the sales program of our product is instituted. In other words, John Jones in Omaha is going to run a sale on evaporated or hemo. We work that on a cooperative advertising basis, whereby we will send him advertising material such as window displays, counter pieces, window strips. A salesman will be allocated to that particular store, and possibly a demonstrator, if a demonstrator is necessary. He inserts 104
the advertisement in his local newspaper or periodical in any manner that he sees fit, pays for it himself, but in the cooperative advertising end of it, to compensate him for his expense, we allow him so much a case, pound or stipulated price on the unit, based on a contractual agreement with him for a specified period.

Q. Are suggested texts and layouts for local advertising sent from here to the local store manager? A. No. As I stated, that is a creation of his own mind; how he wants to put it, where, and so on.

Q. What would be the operation under the following circumstances: Let us assume that a chain of grocery stores is opened in the State of Nevada, and they want to handle the Borden products and plug them. What would they 105
do? Would they write to Mr. Ramsdell's department in New York? A. All of the campaign work would emanate from the New York office and would be under the direction, supervision and control of Mr. Ramsdell's department in this building.

Q. In connection with advertisements appearing in local newspapers over the nation, would mats and layouts be sent from this office to the newspapers in which these advertisements are to appear? A. No, sir.

Q. How would it work out? A. Just as I outlined the one case before. We do not nationally advertise in newspapers. That advertising would be created in the local areas.

Q. Assuming that certain advertising copy has been approved by Mr. Ramsdell's department and the Borden Company, through Mr. Ramsdell's department, had decided to make a campaign in a district outside of New York State, wouldn't Mr. Ramsdell's department arrange to have a supply of that advertising material sent to that district and kept in storage to be used as required? A. Yes, sir.

107 Q. Is all printing done at the direction of Mr. Ramsdell in the home office here? A. I will confine that to the full line products division.

Q. With reference to the other products, who would direct and supervise the printing of the advertising material? A. What other products do you have in mind now?

Q. Full line products. A. Full line would be Mr. Ramsdell.

Q. But you said before all manufactured products. A. All full line products.

Q. What are the activities of the legal department of the Borden Company on the fifth floor of this building, generally? A. If a legal question comes up for discussion, it is taken immediately to the Borden Company legal de-
108 partment, and they in turn will either render a decision direct to us or consult general counsel, Milbank, Tweed and Hope.

Q. What other work is done by that legal division? A. The Borden Company legal department is broken down to three departments: One, general, which gets general matters in connection with legal matters; second, workmen's compensation cases, which are handled by all of the Borden

Company divisions or affiliates, and the public liability cases.

Q. Are the employees of the legal division employees of an independent law firm, or the Borden Company? A. The Borden Company.

Q. Are any opinions or decisions written by the legal department in this building for use in states other than the State of New York? A. Yes.

Q. Do the factories and plants of the Borden Company write in for legal interpretations in connection with the operation of their business plants in states other than the State of New York? A. Yes.

Q. Is this a regular course of business that is con- 110
ducted in the legal division of the Borden Company? A. Yes.

Q. Are these opinions shipped across state lines? A. Yes.

Q. Would these advisory opinions and decisions be used for any particular area in the United States or used over the entire nation? A. They would be used in a particular area, because you might not have the same type of question.

Q. Their work covers area all over the nation? A. That is right.

Q. Will you please tell us what the activities of the Borden Company are on the sixth floor of this building? A. There is the mailing department and accounts receivable department, and the cashier's department. Those depart- 111
ments, I think, are self-explanatory.

Q. I would like to find out what the mechanics are. What does the cashier's department do? Where are the receipts collected from? A. From the customer.

Q. Does a customer come into the building to pay bills? A. Through the medium of checks, money orders, drafts.

Q. For what departments? A. Sales made by the manufactured products division.

Q. Do customers appear in person to pay bills? A. I said through checks, money orders or drafts.

Q. Are these checks, money orders and drafts sent across state lines to the Borden offices in this building? A. A great many of them are.

Q. Are these checks, drafts and money orders sent pursuant to sales made across state lines? A. Yes.

Q. Who is in charge of the cashier's office? A. C. C. Turner.

Q. What is his connection with the Borden Company? A. Cashier.

Q. Is he an officer of the company? A. No.

113 Q. Is the cashier's office in this building the only place where payments can be made to the Borden Company as a result of sales made by the Borden Company elsewhere? A. Checks are sent to this office exclusively, with the exception of isolated cases.

Q. Where are checks sent for other products of the Borden Company? A. To the location where the home office is.

Q. Are you selling any articles out of 350 Madison Avenue which do not come under the manufactured products division? A. Yes, cheese.

Q. Payments for those sales are made to the Borden Company at 350 Madison Avenue? A. Yes, there is one exception to that which is very minor. The Chicago office of the Borden Cheese Company will not remit to 350 Madi-

114 son Avenue. They have their own accounts receivable out there and make their own collections.

Q. Do invoices for manufactured products and cheese products of the Borden Company, which are sent out from the offices of the Borden Company at 350 Madison Avenue, contain notices that remittances should be sent to the cashier's office in this building? A. Remittances are to be made to 350 Madison Avenue, and then they just find their way to the cashier's office.

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Q. Does the cashier's division or department of the Borden Company do anything else besides sent out invoices and collect remittances which are sent to it from sources outside? A. They do not sent out invoices. They are a collection agency only.

Q. They do not do anything else in that particular office? A. No.

Q. What are the activities of the credit department of the Borden Company at 350 Madison Avenue? A. The passing on credit for orders received for shipment, and also to the keeping of the records of the accounts receivable.

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Q. Do they have any investigators attached to that office? A. No.

Q. How do they operate? A. We have our own records. We consult the Dun & Bradstreet book.

Q. From where do they get their requests for credit standing of customers? A. The sales department and representative in this building.

Q. And do they send any of these credit reports across state lines? A. Yes.

Q. In any particular locality, or over the nation? A. All over the nation.

Q. Do they get any requests for credit reports from brokers or Borden representatives in states other than New York State? A. Yes.

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Q. And credit reports are then forwarded to these people that request the investigations? A. Yes.

Q. Isn't it true, Mr. Wyman, that no sale is affected anywhere in the country except that it is subject to the credit department in New York? A. Yes, sir.

Q. Are there any other activities of the credit department that you have not mentioned? A. No.

Q. Who is in charge of the credit department? A. C. E. Craneh.

Q. Is he an officer of the Borden Company? A. No.

Q. What are the activities of the label department of the Borden Company on the sixth floor? A. The passing on the suggested labels for various products, as to size and contents.

Q. Are layouts made or mats made for these labels that are thought out by the label department? A. No.

Q. Isn't it true that your products come under the Pure Food and Drug Act and your labels must conform to the federal statute? A. Yes, sir.

Q. Is the copy for those labels written by the people in the label department? A. No.

119 Q. Who writes the copy for the labels? A. Various affiliated divisions of the Borden Company.

Q. Are these labels sent across state lines from the home office at 350 Madison Avenue? A. Yes.

Q. The label department's chief function is to pass upon the design or contents of the label and to obtain a legal opinion of those labels? A. I would answer that in this way—the label department is a clearing house for all labels.

Q. And no label is ever printed unless the person responsible for that label gets the approval of the person in charge of the label department at the home office? A. That is right.

Q. Who is in charge of the label department at the home office? A. Nominal charge is E. C. Thompson. Actually, the passing on the labels is through a committee.

120 Q. Who are members of this committee? A. I don't know that.

Q. Are these labels corrected or changed by members of the label department, or are they simply approved or not approved? A. They are changed as far as ingredients are concerned.

Q. Do any of these labels originate from any of the divisions of the Borden Company in this building? A. Yes.

The manufactured products division in this building may originate ideas for labels and draft those labels and send them up to the label department for final approval.

Q. Are any of these labels sent across state lines to your various plants and factories scattered all over the nation? A. The finished label, yes.

Q. Where are these finished labels prepared? A. At the printer's.

Q. Where would he be? A. He might be all over the country.

Q. So that after a sample label is designed in one of the various departments in the building, it is then sent to the label department on the sixth floor for approval, checked by the legal department, and then the label will be sent from here, across state lines, to a printer who will prepare it for use in connection with a product? A. Yes.

Q. Would these labels be affixed to your products? A. Yes.

Q. And the products would be sold across state lines? A. Yes, sir.

Q. Is there any other activity of the label department which you haven't mentioned? A. Not that I know of.

Q. Does the Borden Company have its own mail department on the sixth floor of this building? A. Yes.

Q. What is mailed from that department? A. Correspondence.

Q. To whom? A. To various factories, individuals, customers, brokers.

Q. Are any commodities mailed from that mail room to places outside the State of New York? A. Occasionally.

Q. What products would be sent across state lines through the mails from this building? A. That is problematical. It might be any product, as a sample.

Q. What samples would be sent from this building to places outside of the state? A. A sample of condensed milk.

Q. Would this be a regular practice? A. No, sir, it would not, it would be extreme.

Q. Would these samples be sent to customers outside of the state? A. They might be a sample or a replacement to a complaint.

Q. Under what other circumstances would samples or commodities of the Borden Company be sent from this building to places outside the state? A. Only under these circumstances.

Q. Are orders ever taken as a result of these samples that are sent out from the home office at 350 Madison Avenue? A. Yes.

125 Q. Would that be a substantial part of the business of the Borden Company in this building? A. No.

Q. The orders taken pursuant to the samples sent from the premises are negligible? A. Yes.

Q. Does your mailing department handle all incoming mail as well as outgoing mail, and attends to its distribution? A. Yes.

Q. Does all outgoing mail from the various departments of the building go through the mailing department? A. Substantially. In the ordinary course of business all mail would go through the mail room.

Q. How does it get from the various divisions to the mail room? A. By messenger.

Q. How do those messengers travel? A. Both by stairs and elevators.

126 Q. What means are used for the distribution of incoming mail? A. Through messenger service. They use either the stairs or elevators.

Q. Are any commodities received from outside sources by the mail department in this building? Do your factories send their products to the mail room here? A. Yes.

Q. Is that regularly done? A. In particular cases, yes.

Q. What cases do you have in mind? A. In connection with defects which may appear in the packaging of Borden

products, samples of Borden products would be forwarded to the home office here so that we could examine the products for explanation of the defects.

Q. Would any other commodities be sent to this office building? A. No.

Q. Would these alleged defective packaged Borden products be sent across state lines? A. Yes.

Q. What other functions does the mail department render for the Borden Company here? A. Messenger service.

Q. For the purpose of collecting mail and distributing mail? A. Not only mail. More in the form of an office boy, inter-office communication, etc.

Q. What means of travel between offices do the messen- 128
gers use? A. Stairs and elevators.

Q. They would render services throughout the building, is that correct? A. That is right.

Q. Who is in charge of the mail room? A. Nominal head would be G. M. Van Valkenburgh.

Q. Is he an officer of the Borden Company? A. No.

Q. What are the activities of the manufacturing department of the Borden Company on the seventh floor? A. Supervision of running instructions for the manufactured products, exclusive of casein and milk sugar.

Q. Where are these running instructions sent to? A. Various factory locations throughout the United States.

Q. Do these factories make commodities for the Borden Company for shipment across state lines? A. Yes.

Q. To what extent are the superintendents of the indi- 129
vidual factories allowed to exercise their own judgment, and to what extent, in general, are they controlled from the manufacturing department on the seventh floor in this building? A. They are entirely controlled by the manufacturing department.

Q. Could you give us some details as to the directions which are sent out from the seventh floor? A. The manufacturing department receives advice from the various factories as to the pounds of milk received daily. If the supply

130 *Plaintiffs' Exhibit 1—Deposition of Wyman.*

of milk is inadequate for economical operation, the manufacturing department will issue instructions to some other factory to divert their milk to the manufacturing plant, or will change running instructions of this plant from either condensed to evaporated or some other manufactured product which the factory is qualified to run.

Q. In other words, the manufacturing department on the seventh floor instructs the various factories throughout the country when they should increase production, when they should decrease production, and when they should change the form of production? A. That is right.

Q. And it also controls the supply of raw material for
131 each plant? A. Yes.

Q. In other words, the manufacturing department in this building is the pulse of the supply and demand condition of the individual factories and plants of the Borden Company throughout the United States? A. Yes.

Q. Would these products from these factories be sent across state lines as a result of the direction and control exercised by the manufacturing division in this building? A. Yes.

Q. Would the superintendents of these individual plants and factories of the Borden Company inquire of the manufacturing division in the Borden Building as to their instructions in operating and supervising their respective plants and factories? A. Yes.

Q. What particular inquiries would be made by the superintendents of these individual plants and factories? Would they inquire of this division in connection with equipment at the plants, repairs, labor situation? A. Yes.

Q. What other things would they get in touch with this department for? A. Purchase of trucks and automobiles, plant expansion.

Q. Would the orders for construction of increased facilities be placed through the manufacturing division? A. Yes.

Q. No one of these superintendents of the plants and factories that we have mentioned would have independent discretion as to any of these activities that you mentioned? A. Only in the regular course of business. For plant expansion or new equipment, no.

Q. They would have to get direction and approval from the manufacturing division in New York? A. Yes.

Q. Does the manufacturing division in New York employ the top manufacturing personnel of the various plants? A. They are appointed by the manufacturing department.

Q. Who would be in charge of the letting of contracts for various business matters which might arise in connection with the operation of these individual plants and factories scattered all over the nation? 134 A. They would have to get approval from the New York office.

Q. What about the budgets of these plants and factories which would be under the direct control of the manufacturing division in this building? A. The budgets are all set by the manufacturing department through audits from the individual factory superintendents as to their requirements.

Q. Would the manufacturing division in this building send any one out to inspect the plants and to examine the plant from an efficiency standard? A. Yes.

Q. Do you maintain a staff of efficiency experts in this building for that purpose? A. We maintain engineers.

Q. How large is that staff? A. We have two engineers.

Q. The business of these engineers would be to examine 135 the plants scattered all over the nation and render reports to the manufacturing division of the home office? A. That is right.

Q. In connection with financing for expansion work, is any financing arranged outside of the home office by these supervisors at the plants? A. No.

Q. All bills would be paid from the home office for expenditures like expansion and purchase of trucks? A. Not all.

Q. Who would pay for those things? A. It all depends on the type of expenditure. Labor would be paid by the factory. Equipment, particularly heavy equipment, would be paid by the New York office. It would be the New York office that would make the contract with the manufacturing concern of the piece of equipment.

Q. Are negotiations for the purchase of equipment handled in this office? A. That should be qualified as to type. Heavy equipment would be handled here.

Q. Does the manufacturing division have any other function beside those that you have mentioned? A. They are in charge of tin shops and machine shops where tin cans
137 are manufactured.

Q. They have supervision over manufacture of your receptacles? A. That is right. We manufacture our own tin cans. They control the size, quantity and production of tin receptacles for Borden products.

Q. What are some of the commodities manufactured by the Borden Company in its plants and factories all over the nation, over which direct control and supervision is exercised from the office at 350 Madison Avenue? A. Vitamin concentrates, casein, cheese, production of fluid milk, cream, butter; we handle eggs, sardines and canned fish, fresh fish, livers, poultry, feed, animal food. I think those are the principal products. Also orange and lemon powder, dehydrated soups and powdered coffee.

138 Q. Do you do your own canning of sardines? A. Yes, in San Francisco.

Q. Is that controlled from this office? A. Yes.

Q. To the same extent that the manufacturing division controls the various products you just described? A. No, because that is a seasonal operation. There are no running instructions there other than the size of the can and the flavor of the sardines.

Q. Is there anything else that you have not mentioned about the activities of the manufacturing division? A. We

have covered the running instructions, the engineering staff and the tin shops and machine shops.

Q. Are new methods of manufacture determined in this building? A. Yes.

Q. When those methods are developed and approved by the people in this building, are instructions to use the new methods sent out to all the factories? A. Yes.

Q. What are the activities of the accounting department on the eighth floor? A. The eighth floor is broken down into three departments. There is the bank reconciliation division. I think that speaks for itself.

Q. What banks are you referring to, the local banks or banks wherever the Borden Company has accounts? A. 140
Nationwide.

Q. Every time a factory superintendent in Oshkosh draws a check, do you get a record of that here? A. Yes, every single check.

Q. Are duplicate statements furnished this office of banking activities of a factory in a state other than the State of New York? A. The original record comes here and the duplicate is retained by the superintendent of the factory or plant.

Q. Bank vouchers are sent to the New York office, together with the original bank statement? A. That is right.

Q. These bank statements and cancelled vouchers are forwarded to the home office by the individual factory superintendents? A. That is right.

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Q. Does the accounting department only receive these banking statements and cancelled vouchers or does it do anything after receipt of those things? Does it send back any reports to the superintendents of these plants? A. If there are any errors we write back, or if there has been no endorsement.

Q. In other words, the accounting division supervises the control over the deposits of the individual plants and factories? A. That is right.

Q. Do you receive the same information as to every petty cash payment of the various factories? A. Yes.

Q. Does the bank reconciliation division of your accounting department do any other things beside the activities you just mentioned? A. No.

Q. What is the next division of your accounting department? A. Cost.

Q. What, in detail, are the activities of the cost division of your accounting department? A. The collection of different expenditures made, and arriving at the individual factory cost of a product manufactured.

Q. Are men sent out in the field to gather these statistics
143 and figures which you require? A. No, the factory sends it all in.

Q. On the basis of these reports, costs are computed for the different commodities of the Borden Company? A. Yes.

Q. On the basis of these cost figures, what is done? A. We retain them here.

Q. What uses are made of the results of the work of the cost division of the accounting department? A. The general accounting department.

Q. From there, where are they sent or used? A. In arriving at an income profit and loss statement.

Q. Are the results of this cost accounting method ever used in reaching decisions to discontinue the manufacture
144 of a certain product or change the method of production of a product? A. Yes, infrequently, but it is a determining factor.

Q. Are the results of this study used sometimes in increasing the production of a particular article? A. Yes.

Q. What divisions of the Borden Company use these cost analyses which are prepared by the accounting division? A. Manufactured products and cheese.

Q. What divisions of that department rely on these cost analyses? A. Sales department.

Q. What about the purchasing department, would they have anything to do with these cost computations? A. That would be more or less fixed. We know what the manufacturing cost will be.

Q. Before a new product is manufactured, does the cost accounting department estimate the cost of producing such article? A. They assist other people in this building in such work.

Q. Does the cost division of your accounting department impose the method of figuring costs in the various factories? A. We do all that here. The method is devised here.

Q. What else does the accounting department do? A. 146
The disbursing division.

Q. What exactly do they do? A. Pay all bills, invoices; they pay brokers' commissions based on sales of sales representatives; make payments on any contracts we have entered into; they keep track of and distribute factory disbursements; they check the factories' report against the materials record to see if the goods have been received and paid for. That covers the whole scope.

Q. And this disbursement division of the accounting department would cover all the factories and plants of the Borden Company throughout the nation? A. Yes, the manufactured products division.

Q. Do they also supervise the inventories of the factories? A. No, sir.

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Q. Who does that? A. The stock department does that.

Q. Please explain the activities of the accounting department in connection with the checking of factory receipts of materials and other things which affect the individual factories and plants. A. As an illustration—if a factory had three carloads of coal come in, 250 tons per car, we would get a receiving report acknowledging receipt of that coal by the factory. We have laying in our files a coal bill from

the respective coal company that they had shipped to a certain location. If it is a discounted bill, we would pay it. If it is a thirty-day bill, we would hold that and check it against the invoice, and that would be our verification that the coal had been received and the bill was in line for payment.

Q. In other words, the accounting division acts as a control system of all the plants and factories of the Borden Company wherever they may be situated? A. That is right.

Q. Is there anything else that the accounting department does that you have not mentioned? A. No.

Q. What about the payroll records here, do they have
149 anything to do with that? I mean the building payroll. A. That is on the ninth floor.

Q. What are the activities of the Borden Company on the ninth floor? A. The stock department. They keep track of all production, all sales.

Q. This stock department is part of your accounting department, is that correct? A. Yes.

Q. How do they keep check or control over the production of Borden products in these individual plants and factories over the country? A. They send in a semi-monthly and monthly statement of their production, by products.

Q. What does the accounting department do with these reports that they get from the individual plants and factories? A. They compile records of the inventories, add the production to it, decrease it by their sale, and have an
150 inventory at the end of the outlay. We run a perpetual inventory for every plant and factory.

Q. Does the accounting department have anything to do with the increase or decrease of inventories for the production of Borden products of these individual plants and factories? A. No. It just acts as a sort of control check.

Q. And who uses these results of the stock department? A. They are used in arriving at the final statement of the finished stock on hand, raw materials and supplies. The

manufacturing department is kept fully advised by the factories as to their requirements. We would know generally from the inventory, but if a factory ran short of stock, the stock department would not be interested. Raw materials and supplies and the actually finished stock records are kept in the cost department on the eighth floor. The stock department is the compiling agent of those records from a quantity standpoint only, which are turned over to the cost department who apply the cost of production to the quantities produced to establish their finished stock or finished stock records. Manufactured materials are controlled entirely by the cost department. Our stock department is a stock department of finished goods only. 152
It has no bearing on manufacturing materials.

Q. And those reports would be of use to what particular division of the Borden Company? Just for the purpose of having general information with regard to the finished products of the company? A. No. The stock department is dependent upon another department on the ninth floor, which is the sales tabulation department. If you start off at the beginning of the period with an inventory of stock, the tabulation sales department make the tabulation of all the sales made to the customers that tie in, from a money standpoint, with the charge to the accounts receivable.

Q. The figures of the sales tabulating department would jibe with your accounts receivable department? A. Yes.

Q. What is the function of the income tax department 153
with reference to the activities of the Borden Company? A. The filing of federal, state, dominion and provincial income tax returns.

Q. Is that based on information obtained from the accounting department? A. From the accounting department, as far as the manufactured products division is concerned. In the income tax department there is a situation that represents the entire Borden organization. Look at this from a national basis. There you lose all lines of de-

marcation as to division, or what have you. That is what we might term as one of the departments that come under the corporate accounting set-up. In other words, that is the Borden Company.

Q. As a result of the said work in the income tax department, are there ever changes in methods of production for articles proposed? A. No.

Q. Is it the function of the income tax department to allocate the operations of business of the Borden Company in different states throughout the Union? A. No.

Q. Don't they segregate the activities of the Borden Company? A. That information is all obtained from the sales
155 tabulation department from the amounts of business in the various states.

Q. Does the income tax department have any direct contact or communication with the factories and plants of the Borden Company throughout the nation? A. No.

Q. It only works internally in this building? A. That is right. There are very few of our departments, outside of the manufacturing department, that will contact the various plants direct. All of that contact work is done from my office. As a matter of illustration—there was a change in the tax law on liquor. They will write me a memorandum to the effect that on a certain date there was a change in the tax on liquor. They will ask me what the inventories of spirits at our various locations were, whether it
156 was brandy, or in other words, the type of liquor and quantity. I get all of that information and turn that over to the tax department so that they can make up the return and requisition a check to pay for the tax. They will check up matters of rebates on laws that have been put in effect on various tax measures.

Q. As a result of the work done by the income tax division, are taxes paid to the home offices of the states entitled to the same? A. Yes.

Q. Are returns prepared in this building and shipped across state lines? A. Yes.

Q. Are there any other activities of the Borden Company on the ninth floor? A. The payroll tabulation.

Q. What do they do? A. They draw the check to pay the employees.

Q. Where? A. In this office and throughout the United States.

Q. How does that work out? A. We have a salary classification as far as amount is concerned, in the majority of cases. If any employee receives an amount equal to or above the salary classification, he is paid from this office. In other words, the rank and file at our affiliated divisions 158
are paid locally. It is only the higher paid workers who are paid from here.

Q. What about the ordinary employees of the Borden Company in this building, are they paid from this accounting division? A. All employees in this building are paid from this office.

Q. Are checks mailed from the home office to these executives outside of the State of New York? A. Yes.

Q. They are mailed periodically? A. They are mailed semi-monthly.

Q. In the case of other employees who are paid through the factories and divisions where they work in various parts of the country, are they paid by check or by cash? A. They are paid by check drawn by the factory.

Q. Do you get a duplicate of those checks or a list of 159
checks drawn? A. We get the cancelled checks. They come to the bank reconciliation department.

Q. There are no other activities conducted by the Borden Company on the ninth floor, other than those mentioned? A. No.

Q. On the tenth floor you have the controller's office. Will you tell us what the function of the controller's office is with respect to the activities of the Borden Company?

A. The activities of the department are those indicated as my activities, in answer to the question asked yesterday: "Will you please explain your duties and the duties of your accounting office in connection with the division that you are connected with?"

Q. What is your control over personnel outside of the State of New York? A. None.

Q. How would your office be affected by union or labor problems outside of the State of New York? A. Not any.

Q. Who would handle labor relations matters arising from various factories? A. The legal department exclusively.

161 Q. Where are wage policies determined? Wage policies of people employed in the various factories? A. The manufacturing department has charge of that. Questions of union recognition and the like would be handled by the legal department.

Q. Who would have charge of the problems of ways of getting new employees if there is a labor shortage? A. That would be up to the factory's superintendent.

Q. Who has control of priorities and allocation of materials? A. The priorities division located in this building.

Q. Does the legal department take part in the bargaining with labor? A. I don't know.

Q. Coming back to the accounting department, are accounting reports prepared in this building ever sent across state lines from the New York office to plants outside of
162 the state? A. Yes.

Q. Are there any other activities of the controller's office which you didn't mention in your answer yesterday? A. That would be hard to answer, because it isn't strictly all accounting, the work that I do.

Q. You mentioned yesterday about visiting plants and factories of the company throughout the United States. What would be the reason for your visits at these plants and factories? A. From an administrative standpoint, personnel and accounting procedure.

Q. You would exercise direct supervision and control over the plants that you visit? A. From an accounting standpoint, yes.

Q. As far as personnel, what would the extent of your work be? What would you do with regard to personnel? A. Offer suggestions as to either increase or decrease of personnel in that office.

Q. Would you be more or less of a trouble shooter for the company when you went out to these plants and factories? A. No, I would say more educational.

Q. To educate the superintendents of these plants? A. It would be not so much in the plants, more sales offices.

Q. You would instruct them as to methods and pro- 164
cedure developed at the home office here so that there would my a systematic running of the business of the Borden Company? A. That is right.

Q. After these visits were completed, you would instruct them as to their duties with respect to the home office? A. In reporting to the home office, yes.

Q. You continue direct control and supervision over the plants and factories from the home office upon your return to the home office? A. That is right.

Q. Would you have anything to do with the purchasing of raw materials or supplies for these plants? A. No.

Q. All you would do is check the supplies and raw materials? A. I wouldn't even do that.

Q. You would check inventories? A. No.

Q. Is there anything that you can think of that we haven't 165
mentioned as far as the controller's office is concerned? A. No, I don't believe there is.

Q. In your migrations to the plants of the Borden Company, would you personally employ any of the personnel or interview them? A. I might, yes.

Q. You have a photostat division on the tenth floor. What is the extent of their activities? A. Making photostat copies

of financial statements and other things that might have to be photostated, such as correspondence, cancelled checks.

Q. And would the products of this photostat division be sent across state lines from the home office? A. Yes.

Q. Who would handle the shipment of the photostats from the home office? A. I am not entirely sure. I think they are shipped over to our stationery room on 45th Street.

Q. Where is the stationery room? A. On East 45th Street—our print shop.

Q. What other activities are there on the tenth floor? A. We do photo offset work on the tenth floor.

Q. Where would these photo offsets be sent? A. All over
167 the country.

Q. Would this be to your sales district managers? A. To various affiliated companies or divisions. We send them letterheads, forms.

Q. This would be done regularly on the tenth floor? A. Yes.

Q. Would any orders for photo offset work be sent to this building? A. Yes.

Q. From the various plants and factories throughout the country? A. Yes.

Q. As a result of these orders, photo offset work would be done here and these orders would be met from work done on the premises? A. Yes.

Q. Can you give us any idea of the quantity of work that is done in the photostat department? A. Do you mean
168 from a production standpoint? The majority is done for the home office here.

Q. About how much is produced for shipment across state lines? A. I wouldn't know exactly.

Q. Can you give us an approximate idea of the quantity of photo offset work that is produced on the tenth floor and sent across state lines? A. I couldn't say.

Q. Could you explain what you mean by photo offset work? What have you in mind when you use that phrase?

Your photo offset work would be a substitute for the typewriter? A. It is an entirely different process. Photo offset is part photography and part printing. The advantage of photo offset work is that quantities can be made in quick time, and the use of the photo offset work is for copies of financial statements, instructions to plants and factories, letters regarding OPA rules and regulations and instructions, WPB instructions, priority letters of instruction.

Q. And these photo offset letters are mailed in quantities across state lines to individual plants and factories of the Borden Company? A. Yes.

Q. Will you state approximately the average quantity of photostat and photo offset work produced on the tenth 170
floor of this building and shipped across state lines from October 24, 1938 to date? A. I don't know offhand. I will get the information for you.

Q. You mentioned forms being prepared by the photo offset department on the tenth floor. What forms are prepared? A. When I say forms—I might want a special form printed up in a hurry. I would get them to do that instead of the stationery room because I could get much better service.

Q. Would memoranda be prepared by the photo offset department for use at the plants and factories of the company throughout the United States? A. Yes.

Q. Would accountants reports be prepared and photo offset here and then transmitted to the various plants and 171
factories of the organization? A. Yes.

Q. How about briefs? Would they be done in the same way? A. No.

Q. Is there anything else that the photo offset department does that you have not mentioned? A. No.

Q. Who is in charge of the photostat division? A. J. W. Strasser.

Q. Is he an officer of the company? A. No.

172 *Plaintiffs' Exhibit 1—Deposition of Wyman.*

Q. Are you in charge of the accounting office in this building? A. Yes.

Q. You are not an officer of the company? A. No. Our accounting department is departmental. We have heads for each department.

Q. How many employees are there in the photostat division? A. Five or six.

Q. What is the maximum number since November, 1938, to the best of your recollection? A. Six.

Q. Are there any other activities of the Borden Company on the tenth floor? A. General accounting department.

173 Q. What is their function? A. The compiling of statistical and financial statements and property records.

Q. Where are these records used? A. By the officers of the company in this building.

Q. Are those records ever sent across state lines to places outside of the State of New York? A. Yes.

Q. Directly or indirectly? A. Directly.

Q. Are those the records that are photostated by the department on the same floor? A. Yes.

Q. Are they sent regularly or at different intervals of time? A. Regularly.

Q. For what purpose are they used? A. To advise the executives and the various divisions of their operations.

Q. What is it based on? A. Their sales volume only.

174 Q. How do these plant superintendents act on these reports that you forward to them? A. We do not send those reports, or any financial statement, to a factory superintendent. The financial statements are originally created by another division of the Borden Compa[illegible]. There is no financial statement ever given to facto[illegible]perintendents.

Q. Where do these statements go? A. To the home office of the division.

Q. Where would these home offices be? A. Throughout the United States. 175

(Examination adjourned to May 6, 1943, at 2 P. M., at the same place.)

EXAMINATION continued pursuant to adjournment.

Direct testimony.

Q. Mr. Wyman, when you referred to "these premises", "Madison Avenue", "New York Office" and New York in general, did you mean the premises at 350 Madison Avenue? A. As I recall, yes. 176

Q. What is the amount of photostats or photo offset work done on the tenth floor in premises 350 Madison Avenue? A. For the year 1938, $4,488.49; 1939, $23,352.51; 1940, $28,071.87; 1941, $31,171.74; 1942, $15,475.04. That covers the period October 24, 1938 to May 1, 1942, by years.

Q. What are these figures, cost figures or sales figures? A. They are cost figures.

Q. Do you know how the cost figure is arrived at with reference to the photostat and photo offset work? A. Labor, rent, heat and light, depreciation and material.

Q. Are any administration expenses included? A. No, sir. 177

Q. Can you tell us what percentage of the photostat and photo offset work produced went across state lines? A. By years?

Q. Yes. A. For the year 1938, subsequent to October 24, 5.26; 1939, 5.38; 1940, 4.13; 1941, 3.99; 1942, 4.41.

Q. How did you compute those percentages? A. Checking back our records on the shipments that went direct to Borden units outside of New York State.

Q. Would these percentages include any work that went indirectly to those plants and factories outside of the State of New York? A. No.

Q. Have you any record of that work? A. No.

Q. What is the equipment of the plant on the tenth floor for photostat work and photo offset work? A. A photostat machine and a dryer, for the photostat. For the photo offset, a camera, machine for the transferment of the negative to a metallic plate. The metallic plate is then developed, dried, and placed on a printing machine.

Q. Any other machinery in the plant? A. A paper cutting machine.

179 Q. Do you have the cost of the machinery that is in the plant? A. Yes.

Q. What did it cost? A. As of April 30, 1942, $12,750.75.

Q. Do you do any photostat work or photo offset work for anybody other than the Borden Company? A. No.

Q. This is exclusively for the Borden Company? A. That is right.

Q. Do instructions to the various factories of the Borden Company, dealing with the production of goods, constitute a substantial portion of the matter which is photostated? A. No.

Q. What sort of memoranda are prepared by the photostat and photo offset department for use at the plants and factories of the company throughout the United States? A. That might be a memorandum form that the factory is

180 to use in reporting to Madison Avenue.

Q. What else? A. Accounting instruction letters.

Q. What else? A. Regular authorized forms that are given for numbers.

Q. Is there any other work done by the photostat or photo offset plant that you have on the tenth floor, that you have not mentioned before? A. No.

Q. Is there anything else on the tenth floor in which the Borden Company engages, that you have not mentioned

before? A. No. There is the public accounting department. When our records are audited each year, we have to have some place for the auditors to use as an office. It is really a matter of accommodation.

Q. These facilities are only for the independent auditors that come in from time to time? A. That is right.

Q. What are the activities of the Borden Company on the eleventh floor? A. Those are the executive offices.

Q. What executives occupy the facilities on the eleventh floor? A. The president of the Borden Company, the executive vice-president, the treasurer, one or two vice-presidents, secretary, assistant secretary and assistant treasurer. 182

Q. In a general way, what are the duties of the president of the Borden Company? A. Formulating policies for the Borden Company operations.

Q. Has he anything to do with the issuance of instructions to any of the plants and factories of the Borden Company wherever they may be situated? A. Not directly.

Q. How does he do it, if it is not directly? A. It would be through the vice-president in charge of the particular operation where running instructions might be changed.

Q. In other words, he would be the responsible head of the organization, with whom the officer in charge would consult? A. Naturally.

Q. The decisions which he reaches as to methods of production, running instructions, etc., are, through instructions which he gives to other people in this building, carried out? A. Yes. 183

Q. Would any of these instructions affect the production of commodities of the Borden Company wherever they are produced? A. Not necessarily.

Q. In what situation would they emanate from him? A. Mr. Montague is the responsible head of the Borden organization with whom subordinate heads consult with reference to the policies and other questions as they arise.

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Q. What about the vice-presidents? A. I have accounted for all of the vice-presidents with the exception of a few. They are Mr. George M. Waugh, Jr., executive vice-president, Mr. R. V. Jones, vice-president in charge of ice cream, Mr. Harold W. Comfort, vice-president in charge of fluid milk operations, Dr. Harry A. Ross, our economist, and Mr. C. F. Kieser.

Q. I think we should start with Mr. Waugh, Jr. Tell us what his duties are. A. He is a liaison man between the president and other operating vice-presidents.

Q. Please explain in detail the duties of Mr. Waugh, Jr. A. We will start off with the accounting policy of the com-
185 pany; the expansion with respect to new buildings and new products in connection with part of the Borden operations; the approval of new acquisitions of companies producing a product other than formerly sold by the Borden Company or a product now produced by the Borden Company. These expansions are confined mostly to the manufacturing division.

Q. Would Mr. Waugh have direct control over any of the activities or would he work through these vice-presidents in charge of special divisions of the Borden Company? A. Through the vice-presidents.

Q. In connection with new buildings and new production, would it be Mr. Waugh who would make the decisions, subject to the approval of the president of the Borden Company, whether to buy new land, erect a new factory there,
186 discontinue an old factory, and would he similarly make decisions as to production of new commodities or products or purchase of companies in allied lines? A. Yes.

Q. He would also make decisions as to new methods of production, labor devices, etc.? A. No.

Q. Who would? A. The vice-president in charge of the operation in this building. The recommendation might be concurred in by the president or the vice-president in charge of the actual operation.

Q. In this building, decisions would be reached as to new methods of production, new machinery for production, and instructions sent out to the various factories? A. Yes.

Q. Where are meetings of the board of directors held? A. On the eleventh floor of 350 Madison Avenue.

Q. What are the duties of the Borden directors? Would it be a correct statement to say that they guide the general policy of the company? A. Yes.

Q. Would they have to approve of any of these decisions for new acquisitions of land or other companies? A. They are submitted to the board for approval. It is really a ratification.

Q. Who are the board of directors? A. Albert G. Mil- 188
lank, chairman, Harold W. Comfort, L. Manuel Hendler, Austin S. Igleheart, Robcliff V. Jones, Lester Le Feber, Madison H. Lewis, Theodore G. Montague, Marcus M. Munsill, Thomas I. Parkinson, Beverley R. Robinson, Harry A. Ross, George M. Waugh, Jr.

Q. Who is the next vice-president whom we have not discussed? A. Mr. C. F. Kieser.

Q. What are his duties? A. He is in charge of the special products department.

Q. Does he have any other duties besides control over the special products division? A. No.

Q. What other vice-presidents are there? A. Mr. R. V. Jones, in charge of ice cream operations.

Q. Please explain what Mr. Jones' duties are. A. I am
getting a little out of my field now, to be perfectly frank 189
with you. I don't know.

Q. Does the Borden Company have an ice cream division in this building? A. No.

Q. Are any of the activities of the Borden Company in this building connected with the production and sale of ice cream? A. Yes.

Q. What activities? A. Through the vice-president.

Q. What else? A. That is all.

Q. What about the manufacture of ice cream, is he in charge of that? A. No.

Q. Who is in charge? A. That is mostly local.

Q. Where is the accounting department of the ice cream division? A. They are all over the country. They are in groups. The final statements come to Madison Avenue and are consolidated into one grand total.

Q. Does advertising for the ice cream companies originate here? A. Yes.

Q. Does the label department approve all labels for ice cream, the same way as it approves of labels for other departments? A. Yes.

191 Q. Do you have any activities with reference to the production of ice cream in this building? A. No.

Q. Is ice cream produced by the Borden Company or its subsidiaries for shipment across state lines? A. Yes, but not in a substantial quantity.

Q. To what extent? A. I couldn't tell you.

Q. You don't have plants in every state of the Union, do you? A. No.

Q. How many plants do you have that produce ice cream? A. I don't know.

Q. Is ice cream, manufactured by the Borden Company or its subsidiaries, sold in every state of the Union? A. No.

Q. In what parts of the country is it not sold? A. I don't know.

192 Q. Who would know? A. Mr. R. V. Jones.

Q. What are the duties of Mr. H. W. Comfort? A. Vice-president in charge of fluid milk operations.

Q. What aspects of the work of the various departments of the Borden Company in this building affect and concern fluid milk? Does the label department approve of the labels on fluid milk? A. Yes.

Q. What other departments? A. That is all.

Q. Advertising? A. Yes, the general advertising would.

Q. Does the Borden Company and its subsidiaries produce a substantial amount of fluid milk which is sold across state lines? A. No.

Q. Is the production of fluid milk controlled by any person or persons in the building at 350 Madison Avenue? A. No more so than the ice cream division.

Q. What about Dr. Ross? What are his duties? A. I think he is a forecaster.

Q. Forecaster of what? A. Food products.

Q. Does he make surveys for the purpose of determining whether or not a product should be manufactured by the Borden Company or withdrawn from the market? A. No. He is an economist with the Borden Company for the 194
purpose of forecasting business trends as they affect the activities of the Borden Company over the nation, both as to purchasing production and sales, and inventories of stocks and raw materials, and he recommends, as a result of surveys which he makes, certain actions by the Borden Company, such as increases or decreases of particular inventories, or whether the sales department can anticipate an increase or reduction in supply.

Q. Is any production increased or decreased as a result of his forecasts? A. It may be. Those are the regular duties of Dr. Ross, but they have been changed by the impact of the war.

Q. Does he have a staff of assistants in this building? A. Yes.

Q. What facilities does he use in his work in this building? 195
A. What do you mean?

Q. I mean he occupies some office space; he must tie in with your organization here. A. He has two assistants who assist him in the preparations of statistics upon which he predicates his conclusions.

Q. Who uses these forecasts or conclusions which are arrived at by Dr. Ross and his staff? A. Various divisions of the Borden Company.

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Q. In this building? A. In this and outside of this building.

Q. Does he have any direct relationship with the plants and factories of the Borden Company all over the nation? A. No.

Q. How does he do his work? A. He works through the vice-president in charge of operations.

Q. Where are the financial statements of the Borden Company for the information of stockholders and others prepared? A. In the general controller's office.

Q. Are they sent from the building to the stockholders? A. No.

197 Q. Where are they sent from? A. The stockholders only get an annual report.

Q. Is it sent from this building? A. No, from our dividend-disbursing agent.

Q. Would this be a correct statement—that the figures to be included in the annual report to stockholders are collected in this building, that the report itself is written in this building, and then it is printed outside of this building and sent by your dividend-disbursing agent across state lines to the various stockholders of the Borden Company? A. Yes.

Q. Where are meetings of the stockholders held? A. In Flemington, New Jersey.

Q. Who is the treasurer of the Borden Company? A. Mr. E. L. Noetzel.

198 Q. What are his duties? A. He is the one who is advised of the cash position of the Borden Company. He consummates loans; is the supervising officer of the accounting department, credit department, bureau of insurance and safety bureau.

Q. What individuals in the Borden organization are responsible to the treasurer of the company? Does the treasurer of the Borden Company exercise any direct control

over the activities of the Borden Company? A. Yes, from a financial standpoint.

Q. Does he have any direct relationship with the plants and factories of the Borden Company in the State of New York and outside of the State of New York, in a financial way? Does he have anything to do with the placing of loans of plants and factories here and elsewhere? A. He would borrow for the Borden Company.

Q. Would any of these loans be obtained for the purpose of expansion of plants, for the purpose of installing new equipment in plants, for the purpose of production in these plants and factories, wherever they may be situated? A. Yes. 200

Q. Does Mr. Noetzel personally negotiate the loans for the corporation? A. Yes.

Q. He doesn't borrow only from New York banks, does he? A. I would say it was only New York banks.

Q. He wouldn't borrow from a bank in Chicago or Philadelphia? A. No.

Q. What is the name of the secretary of the Borden Company? A. Walter H. Rebman.

Q. What are his duties? A. Attending and writing up the minutes of the various board of directors meetings of the Borden Company and affiliated companies and divisions. He keeps all the corporate records.

Q. Does he have anything to do with the out of state plants of the Borden Company? A. Yes.

Q. In what respect? A. If we should form a company in a state and there is going to be an issuance of stock, he will take care of that issuance of stock, usually through our local attorneys. 201

Q. When necessary, he would affix and attest the seal of the corporation throughout the country, wherever said seal and attestation is required? A. That is right.

Q. Would that document be sent across state lines? A. Yes.

Q. What are the duties of the assistant secretary? A. He performs the duties of the secretary, subject to his direction.

Q. What are the duties of the assistant treasurer? A. The same as the assistant secretary, as applying to the treasurer.

Q. Are there any other activities of the Borden Company on the eleventh floor? A. No.

Q. What are the activities of the Borden Company on the twelfth floor? A. There are the offices of the subordinates of the treasurer who help him carry out his duties.

Q. What are the duties of the general controller and his
203 department? A. He is in charge of general accounting procedure for the Borden Company, its affiliates and divisions. His name is Harry L. Camp. The general controller's office is the origin of all instruction letters to various regional accounting representatives in connection with accounting procedure that would affect various operating units established by the Borden Company. The general controller's office is the focal point for the compilation of consolidated income and balance sheets for the Borden Company and its affiliates and divisions, which consolidations are in turn passed on to the officers of the company. I think that generally covers everything.

Q. What is the central transcribing bureau? A. That is where practically all of the dictation is transcribed for the
204 various departments throughout the Madison Avenue organization.

Q. In other words, in general, most of the employees do not have their own secretaries, but when they have dictation it is done up there? A. That is right.

Q. Do they use ediphones? A. Yes.

Q. Are all inter-office communications transcribed there? A. Yes, with the exception of where the individual has a secretary.

Q. Is it frequently necessary for men in the different departments in this building to consult with each other? A. Yes.

Q. How do they travel from one department to another? A. Either by stairs or elevator.

Q. This transcribing office is just a convenience only for the people in 350 Madison Avenue? A. Yes.

Q. In connection with these conferences following elevator trips, are decisions frequently made that affect the production of goods by subsidiaries of the company, which production is to be shipped across state lines? A. Yes.

Q. Will you tell us, briefly, the activities of the purchasing department on the thirteenth floor? A. Mr. W. P. 206
Morse is in charge of that department. He purchases raw materials and supplies for the Borden Company.

Q. How is that done? Do Salesmen visit the Borden premises or the offices on the thirteenth floor for the purpose of selling the Borden Company raw materials or supplies? A. Not exclusively.

Q. How is it done? A. Through contracts.

Q. Who would be in charge of the letting of these contracts? A. The department manager, Mr. Morse.

Q. Would these contracts be advertised, or would they be privately negotiated? A. Privately negotiated.

Q. Would these contracts cover raw materials for all the plants and factories of the Borden Company wherever situated? A. In some instances.

Q. In most instances, what would occur? A. We might 207
contract with various sugar refineries to supply so much sugar, at the direction of Madison Avenue.

Q. Would he purchase supplies and machinery? A. Yes, sir.

Q. If the Borden Company were in the market for a very large quantity of something, would the supervisor of purchases, Mr. Morse, have occasion to visit plants out-

side of the State of New York to see that the set-up was such that they could fulfill a large contract? A. Not so much from that standpoint as it would be to determine their requirements.

Q. I am talking about Mr. Morse visiting the plant or some plant with whom he is negotiating to purchase their merchandise. He would want to be sure that he is going to get the flow of merchandise that the company requires. Would he make a trip to such a plant to satisfy himself? A. I believe he would.

Q. In other words, Mr. Morse, and the people under him in the purchasing department on the thirteenth floor of
209 this building, supervise, negotiate and make contracts for purchasing substantially all of the major supplies, machinery and raw materials needed by the Borden Company and its subsidiaries and affiliates for the production of goods? A. Yes.

Q. Would these raw materials and machinery and products be sent across state lines pursuant to the direction and control of Mr. Morse? If he bought merchandise here it would be shipped from here to let us say Pennsylvania? A. Yes.

Q. How would he determine the requirements of a plant or a factory or a division of the Borden Company? A. Through correspondence with that factory or division.

Q. How would that work out? Would a plant superintendent notify Mr. Morse? A. That would come from the
210 operating vice-president.

Q. What are some of the products purchased by the purchasing department in this building? A. Sugar, coal, tin plate, labels, fibre boxes, wooden boxes, coffee, cleaning powder, heavy machinery, cocoa, malt, liquor, bottles, caps, ice cream cartons, barrels.

Q. And such purchases are used as aids in the production of goods for shipment across state lines? A. Yes.

Q. Are there any other activities of the purchasing department on the thirteenth floor which you haven't mentioned? A. No.

Q. Are there any other activities of the Borden Company on the thirteenth floor? A. No.

Q. When was the Employees Relations Department established? A. March 2, 1942.

Q. Who is in charge of the Employees Relations Department? A. Mr. E. G. Quesnel.

Q. Is he an officer of the Borden Company? A. No.

Q. What, in general, are the duties of the Employees Relations Department? A. The employing of employees, and classification of and adjustment of employees' salaries. 212

Q. Persons employed where? A. 350 Madison Avenue.

Q. Exclusively concerned with this building? A. Yes, sir.

Q. It has nothing to do with the employees in the various factories? A. No, sir. I would like to qualify that. They do not have anything to do with the employing of maintenance men.

Q. What kind of employees are affected by this division? A. Office employees.

Q. They do not employ any persons who act in an administrative capacity? A. They will employ individuals who work in administration departments, but they are clerical help.

Q. They do not employ the heads of those departments? A. No, sir. 213

Q. Who is in charge of the safety bureau on the fourteenth floor? A. Mr. Quesnel.

Q. What are the duties of the safety bureau? A. The direction of safety operations throughout the Borden Company.

Q. Including the factories where goods are produced for shipment across state lines? A. Yes.

Q. He develops, and supervises the development of, systems by which such operations may be conducted more safely? A. Yes, sir.

Q. He investigates methods and mechanisms that can be used for the safety of production employees? A. Partially, yes, in cooperation with the bureau of insurance.

Q. Does he have anything to do with the purchasing of safety equipment for these plants? A. No.

Q. When he reaches a conclusion as to steps to be taken in the plants for the safety of employees, does he send such instructions across state lines to the various factories? A. Yes.

215 Q. Are not such instructions often photostated? A. I cannot recall.

Q. Does the safety division do anything else besides the things you have mentioned? A. No.

Q. What about the stationery department on the fourteenth floor—who is in charge of it? A. Mr. J. W. Strasser.

Q. Is this the stationery department for the activities of the Borden Company at 350 Madison Avenue? A. No; for the entire Borden Company.

Q. Does he send stationery supplies to your plants and factories over the nation, wherever needed? A. Yes.

Q. Who directs him to send these supplies? A. The individual affiliates or divisions.

Q. And what do these supplies consist of? A. Purely stationery.

216 Q. In what quantities are they sent to these plants and factories? Are all the stationery supplies of the plants and factories of the Borden Company, wherever situated, filled by Mr. Strasser's department on the fourteenth floor? A. Not entirely.

Q. To what extent? A. In some instances we might get a better local price than we could print the stuff at our print shop.

Q. But most of the stationery supplies would originate from that division and be sent to the plants and factories from this office building? A. No.

Q. From where are they shipped? A. From various places outside this building, pursuant to instructions given by Mr. Strasser.

Q. Does the Borden Company print its own stationery? A. Yes.

Q. Where are the print shops? A. On East 45th Street.

Q. Is that print shop under the jurisdiction of Mr. Strasser? A. Yes, sir.

Q. And the print shop sends the stationery across state lines under instructions from Mr. Strasser's department? 218
A. Yes, sir.

Q. All of the printing of the Borden Company is done at that print shop on 45th Street, is that correct? A. Not all of it. A substantial part of it.

Q. What other printing is done there? A. The annual report, some advertising material.

Q. When stationery is shipped across state lines to a given division or plant, it is charged by the Borden Company to that plant? A. That is right.

Q. At cost? A. Yes, sir.

Q. Are the stationery and letterheads, and other printed matter on the stationery, written and designed in this building? A. Yes.

Q. Who determines that? A. I would say the officers of 219
the company.

Q. You use uniformity in your stationery? A. Yes, sir.

Q. Does Mr. Strasser's department supply all the divisions of the Borden Company with stationery supplies from this building? A. Yes, with few exceptions.

Q. Are there any other departments on the fourteenth floor? A. The public relations department, in charge of Mr. Milton Fairman.

Q. What are his duties? A. I don't know. He is director of public relations activities for the Borden Company.

Q. What about relations with the Federal government and State government, do they have charge of that? A. Yes, I think they would.

Q. Does it cover all the public relations activities of the Borden Company, wherever the Borden Company is in business? A. I would say yes, throughout the country.

Q. Who is in charge of the special products division on the fifteenth floor? A. Mr. Charles F. Kieser.

Q. Is he an officer of the Borden Company? A. Vice-president.

Q. What special products are within the jurisdiction of this division? A. Animal foods, live stock foods, poultry
221 foods, vitamins, flavors and concentrates. I think that is all.

Q. Are such products manufactured for shipment across state lines? A. Yes.

Q. Does this division operate in substantially the same way as the casein division operations, subject to such changes as are necessitated by the different products? Is production supervised from this building? A. Yes. No products are produced in this building.

Q. Does the label department determine the design of the label and contents of the label, the same way as it determines labels for any other product of the Borden Company? A. Yes.

Q. Would a new food product come under that depart-
222 ment? A. A new food product might come up under any one of the divisions.

Q. Is there anything else on the fifteen floor which you haven't mentioned? A. They have their little advertising department the same as casein and Mr. Ramsdell.

Q. Do they have their own separate sales department? A. Yes.

Q. Do they have any salesmen operating from the office here? A. Yes.

Q. About how many are there? A. I don't know exactly how many there are.

Q. Do those salesmen operate outside of the State of New York? A. Yes.

Q. No sale is consummated without the approval of Mr. Kieser's division in this building? A. That is right.

Q. Are there any other activities of the special products division of the Borden Company on the fifteenth floor of premises 350 Madison Avenue? A. They have other divisions under their supervision, if that is what you mean.

Q. What divisions are they? A. They have a liver plant operation, fish canning operation and fish meal operation.

Q. Those goods are produced for shipment across state 224
lines? A. Yes.

Q. The raw materials for those products are purchased through the special products division? A. Yes, and also in conjunction with the purchasing department.

Q. For use in states other than the State of New York? A. Yes.

Q. The finished products are then sent across state lines? A. Yes. I was also going to say they have a fresh fish business.

Q. How does the fresh fish division of the special products division operate? A. Through refrigerated cars to distributors. It is entirely a wholesale business.

Q. Where is this business conducted? A. Santa Barbara, California.

Q. Is fresh fish sold across state lines or is it purely 225
local in California? A. Local. They also deal in fish livers.

Q. Are fish livers used in the vitamin business of the Borden Company? A. Yes.

Q. Are these operations directed from the special products division of the Borden Company on the fifteenth floor of 350 Madison Avenue? A. Yes.

Q. Do they cross state lines? A. Yes.

Q. Are there any other activities of the special products division? A. No.

Q. Who is in charge of the general advertising department on the sixteenth floor? A. Mr. Stuart Peabody.

Q. What activities are carried on in that department? A. The Borden Company's general and institutional advertising. In other words, advertising devoted primarily to promoting good will for the Borden Company as an institution.

Q. What steps in connection with such general and institutional advertising are taken in this building? Is the copy written on the sixteenth floor or elsewhere in this
227 building? What steps in connection with the advertising of the Borden Company commonly take place in this building? A. It is my understanding that the following is done: The original ideas for the advertising are commonly created in this building by men working in this building. Rough drafts of the advertisements are prepared in this building, the advertisements are drafted in final form and the copy finally prepared either in this building or by our independent advertising agencies; the advertisement in final form is always approved in this building, it is then sent from this building to printers for preparation and transmission to the publications. The finished advertisement, as printed, is approved in this building in all cases. Thereafter it is sent to the company's publications.

228 Q. Does Mr. Peabody work in cooperation with Mr. Ramsdell's advertising division in this building? A. Yes.

Q. What advertising work is done by Mr. Peabody's department which is not done by Mr. Ramsdell? A. None.

Q. In other words, they more or less overlap? A. That is right. While Mr. Ramsdell's unit of advertising comes in on the Elsie end of it, one of their principal advertising media is the matter of display, the approval of customers' advertisements for Borden products in outlying districts.

Q. Are mats ever sent out of this building across state lines? A. No.

Q. What are the activities of the bureau of insurance on the sixteenth floor? A. The placing of all types of insurance for the Borden Company.

Q. Is the Borden Company a self-insurer? A. Partially.

Q. In what respects? A. Fire.

Q. Do they place any security in states where their plants and factories may be, for the purpose of complying with the self-insurance laws of those states? A. Yes, for certain types of insurance, where it is required.

Q. Does this office on the sixteenth floor of this building have charge of insurance for the various factories of the 230
Borden Company all over the country? A. I am not in a position to state that that office has charge of the insurance or self-insurance for the factories of the manufactured products division—the manufacturing group, which includes casein, national milk sugar and special products. We would place from this office the newly created war risk insurance, at given locations where we thought it would be needed.

Q. And the policy of placing insurance over the nation for the plants and factories of the Borden Company, would be determined by the vice-president in charge of this particular bureau on the sixteenth floor? A. Yes.

Q. Is it true, that in order to get the lowest possible rates on premiums, it is often necessary or desirable to 231
install safety devices in the factories of the Borden Company? A. I would say yes. This is done in cooperation with the safety division.

Q. And do engineers operating out of the insurance division or safety division in this building make surveys of the various plants where goods are produced for shipment across state lines, and make recommendations for improvements in those factories? A. Yes.

Q. Is insurance placed on products purchased by the Borden Company for its plants and factories over the nation? A. We insure our finished products at locations. The self-insurance plan would take care of the factory and its contents.

Q. What about the insurance of raw products or other types of products purchased for these plants and factories? A. They would be insured if they were in an outlying storage location, by the bureau of insurance at 350 Madison Avenue. They would cover marine insurance of our fleet on the Pacific coast.

Q. Are there any other activities on the sixteenth floor?
233 A. No.

Q. What are the activities of the Borden Company on the seventeenth floor? A. The experimental kitchen and the laboratory.

Q. Who is in charge of the kitchen? A. Miss Dorothy Belmanno.

Q. What are her duties? A. Experimenting with recipes for our products.

Q. What is done with the results of her experimentation? A. It is made up in booklet form and sent out to the trade.

Q. What is done with the physical results? A. I don't know.

Q. Suppose she makes a recipe—I assume a product is then manufactured based on her recipe? A. No, it is for the housewife. To give you an example—when we built this
234 kitchen we also built a little breakfast nook. Mr. Montague and his clients might go upstairs and have luncheon. If it is something that is prearranged, Miss Belmanno might try out a new recipe. In the majority of cases, the results of a new recipe are consumed right there in the kitchen.

Q. As far as the recipes themselves are concerned, they would then be typewritten, photostated or photo offset and sent to the printer? A. Those recipes would appear in a newspaper or periodical or recipe book.

Q. The Borden Company would print those recipe books and distribute them? A. We could.

Q. You do not know whether it has been done? A. I do not.

Q. So far, the information you have given us indicates that the experimental kitchen is used to determine ways in which a consumer can use Borden products. Is that correct? A. Yes.

Q. Is the kitchen and laboratory also used to determine ways in which Borden products may be made? A. Yes.

Q. Tell us something about that. A. I think there are two separate entities there. I don't think that the kitchen can be tied in in any way with the laboratory. 236

Q. Let us hear about the laboratory. A. The laboratory really got under way last July or August, and the principal item of experiment to which they devoted nearly 100% of their time, was in the manufacture of a good coffee extract and powder. First they would determine the amount of cooking that the coffee should receive before the liquor was drawn off. When they arrived at what they considered was the proper schedule, that schedule would be transmitted to our operating factory and they would base their production on that schedule. After the coffee product had been produced at the manufacturing plant, they would send in samples to see how they correspond with the coffee as produced here and laboratory tested.

Q. You say it was started around July or August. What was done before then? A. It is brand new. Our kitchen used to be on the third floor. 237

Q. Before last July or August, when it was down below, was it purely a kitchen to develop recipes by which consumers might use Borden products, or did it do any of the work similar to what you described? A. No. All they had down there was a range and a G. E. refrigerator. No experimental work was done in this building.

Q. You say there is nothing on the eighteenth floor? A. No.

Q. On the nineteenth floor, the department of industrial relations was established in 1943. Is that correct? A. Yes.

Q. There is nothing on the twentieth floor? A. No. The real estate department is on the twenty-first floor.

Q. Does that deal with this building? A. Activities are not confined 100% to this building.

Q. Who is in charge of this division? A. Mr. A. C. Bowman. He is in charge of all of the property of the Borden organization.

Q. What aspects of it is he in charge of? A. The only
239 thing Mr. Bowman would have to do with a factory is if we had a factory that was not a profitable operation and we wanted to get rid of it, we would tell Mr. Bowman and he would try to sell it.

Q. If you desired to erect a new factory in a new locality, Mr. Bowman would be in charge of trying to buy land? A. Not necessarily. We might find that out through the local superintendent who knew of property that could be acquired.

Q. Would he make leases for any properties which the Borden Company was interested in? A. Yes.

Q. That would be for plants that would be operated by the Borden Company? These plants would be all over the nation? A. Yes.

Q. Any leases that would be made locally by a plant
240 superintendent would have to be with the approval of Mr. Bowman at 350 Madison Avenue? A. Not necessarily.

Q. Have the activities of the Borden Company in this building, as you have outlined them, been substantially the same since October 24, 1938 to date, except where you have otherwise indicated? A. Substantially the same, ex-

cept that it was during that period that the Borden Company acquired the fish and liver business.

(Sgd.) STEPHEN EVERETT WYMAN
Stephen Everett Wyman

Sworn to before me, this
3rd day of August, 1943.

(Sgd.) ROSEMARY PURCELL
Notary Public, Queens County
Queens Co. Clk's No. 1867, Reg. No. 1005
Certificate Filed in
N. Y. Co. Clk's No. 88, Reg. No. 4-P-52 242
Commission expires March 30, 1944
(Notary Seal)

I, BESSIE MILLER SCHWARTZ, the officer before whom the foregoing deposition was taken, do hereby certify that the witness, whose testimony appears in the foregoing deposition, was duly sworn by me and that said deposition is a true record of the testimony given by the said witness.

(Sgd.) BESSIE MILLER SCHWARTZ
Bessie Miller Schwartz

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244

Plaintiffs' Exhibit 2.

Deposition of Raymond V. Marshall.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

Deposition of RAYMOND V. MARSHALL, pursuant to stipulation, at Room 1014, 350 Madison Avenue, New York City, on the 18th day of May, 1943, at 3 P. M.

245 PRESENT:

NEWGASS & NAYFACK, Esqs., Attorneys for Plaintiffs. GEORGE W. NEWGASS, NATHAN COOPER and LEO H. HIRSCH, JR., of Counsel.

MILBANK, TWEED & HOPE, Esqs., and JOHN A. KELLY, Esq., Attorneys for Defendant. JOHN A. KELLY and GEORGE F. KEENAN, of Counsel.

RAYMOND V. MARSHALL, Witness.

IT IS HEREBY STIPULATED AND AGREED, by and between the attorneys for the parties hereto, that notice of the taking of this deposition be waived; that the deposition of Raymond V. Marshall be taken before Bessie M. Schwartz, a
246 Notary Public, at Room 1014, 350 Madison Avenue, New York City, on the 18th day of May, 1943, at 3 P. M.; that all objections as to the qualifications of said Notary be waived; that this deposition may be read in evidence upon the trial of this action regardless of the availability of the witness at such time; that the filing of this deposition be waived; that compliance with Rule 13 of the Local Rules of this Court be waived; that certification of the deposition by the Notary Public before the same is taken is hereby waived; that this

deposition may be sworn to by the witness before any Notary Public, and that a copy of this deposition shall be delivered to the attorneys for the defendant.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

RAYMOND V. MARSHALL, being first duly sworn by Bessie M. Schwartz, a Notary Public, testified as follows:

Direct testimony.

Q. What is your full name? A. Raymond V. Marshall.
Q. Where do you reside? A. Larchmont, New York. 218
Q. Address? A. 11 Jochum Avenue.
Q. What is your occupation? A. Building manager.
Q. For whom? A. The Borden Company.
Q. How long are you the building manager for the Borden Company? A. Since approximately 1937. I don't know what month.
Q. Of what building are you the manager? A. 350 Madison Avenue.
Q. What are your duties as building manager for the Borden Company building at 350 Madison Avenue? A. I rent, collect, and supervise the management of 350 Madison Avenue.
Q. Do you have anything to do with the hiring and firing of maintenance employees at 350 Madison Avenue? A. I 249
do.
Q. Do you hire and fire? A. Yes.
Q. Do you instruct them as to their duties? A. Well, that is left up to a superintendent, but sometimes I tell them. When a man first comes to us I outline his duties and pass him over to the superintendent.
Q. Are you familiar with the duties of the various employees? A. Yes.

250 *Plaintiffs' Exhibit 2—Deposition of Marshall.*

Q. Who is the building superintendent? A. Leroy Smith.

Q. Does he have an office in this building? A. Yes.

Q. Do you have an office in this building? A. Yes.

Q. Where? A. Room 2107. He is in the basement.

Q. Do you have any employees under you in your office on the twenty-first floor? A. Yes.

Q. How many employees do you have? A. One now. There used to be two up to the 15th of this month.

Q. Do you know the following persons: Joseph Borella, Walter Cross, Stanley Gayda, Edward Gramcko, Stanley Grzeck, Alexander Krupica, William Lendo, Thomas Lo Sasso? A. Yes. Walter Cross was a night porter. Stan-
251 ley Gayda was a porter. Thomas Lo Sasso was a porter and then we lost our stock room clerk and now he is stock room clerk.

Q. We are only interested for the period from October 24, 1938 up to May 1, 1942, with slight modification. A. Robert Marshall was a porter, and Andrew Rueb was a porter.

Q. Are they and were they employees of the Borden Company for the period subsequent to October 24, 1938? A. Yes.

Q. What was the nature of their duties? A. They were porters. Porters are assigned to so many floors of the building, to take care of all public space, that is, lavatories, corridors and stairways. Then they are called upon to
252 pack papers at a certain time during the day—the waste paper that we send out. They are called upon to move furniture, if you have to have it moved—if you wanted a desk moved inside, you would call the porters and they would move it.

Q. They would move furniture belonging to the Borden Company, too? A. Yes.

Q. They would be assigned all over the building at 350 Madison Avenue? A. Yes.

Q. Each porter would have a floor assigned to him? A. That is right.

Q. Do they do any cleaning work in the offices of the Borden Company? A. Yes.

Q. Please explain. A. The way we work it is, the porters are for corridors and public space, but if we had an alteration job or something like that, and one of the offices became dirty, they would have to go in and clean it up, although the job of cleaning offices is left to the night women. But they do come in to offices when they are asked. It is not frequent, but they do it.

Q. Who would direct them? A. I would call the superintendent and the superintendent would get hold of the foreman and the foreman would get the office cleaned. 254

Q. Who is the foreman? A. The foreman in this list is Stanley Gayda.

Q. Who would ask you to have these porters assigned for cleaning the offices of the Borden Company or the offices of the tenants? A. Various Borden people.

Q. Various Borden people would call you up and you would act upon their request? A. Yes.

Q. Can you name some of the people who would request you to do this? A. Mr. Wyman.

Q. Anybody else from the Borden organization? A. Any department head, I suppose—Mr. Olmstead.

Q. With respect to the waste paper, what would be done with that? A. It is bagged, and a dealer comes along and takes it out. It is left down in our basement and they come 255 along around 3 o'clock in the morning and take it out.

Q. It is sold to them? A. Now it is. About a month ago we had to give it away.

Q. How about the period subsequent to October 24, 1938? A. The market was up and down. Sometimes we sold it and sometimes we had to give it away.

Q. But it was sold at some time during that period? A. Yes.

256 *Plaintiffs' Exhibit 2—Deposition of Marshall.*

Q. To whom was the paper sold? A. A fellow by the name of Pezza. He is a paper dealer in Manhattan, somewhere uptown.

Q. Are there any other duties that the porters rendered in premises 350 Madison Avenue? A. Cleaned down the elevator shafts once a year. Just general cleaning and maintenance, that is all.

Q. Don't some of the porters distribute towels in the offices of the Borden Company? A. That's right. One distributes towels to the Borden Company.

Q. Would that be in all the offices of the Borden Company at 350 Madison Avenue? A. Yes.

257 Q. He would pick up the dirty towels and exchange them for clean towels, and this would be done regularly once a week? A. Yes.

Q. Are any of the group of people named above night porters? A. Yes.

Q. What are their duties? A. There is where you get in a little more to the inside space, that is, the occupied space. They are Walter Cross and Stanley Grzeck. They will be called upon to scrub linoleum, wax it, and do high dusting.

Q. In the offices of the Borden Company? A. Yes. They will also help the women with the very heavy vacuum cleaner. This office is vacuumed twice monthly. They wheel the vacuum in and the women go around with it.

Q. These two night porters would work over the entire
258 building? A. Yes. Their duties are all over, because they are not responsible for any confined area, such as certain floors. One duty of the night porters is to clean the elevator doors we have downstairs.

Q. Do the porters do any other work besides that which you have enumerated? A. Occasionally they would destroy old records of the Borden organization in the furnaces down in the basement of the Borden building at 350 Madison Avenue.

Q. Do the porters have anything to do with the furnaces in the basement other than the destruction of the records? A. They clean out the boilers. We have three boilers with which we heat the building. The New York Steam Company operates those boilers on a very cold day to relieve their steam pressure. We have a little boiler that was used years ago. That's where we burn the papers.

Q. Is that done regularly? A. We clean the tubes and boilers once a year. They have to be cleaned.

Q. What facilities do you have for the maintenance people down in the basement of 350 Madison Avenue? A. Locker room, lavatories, shower.

Q. Do any of these men take care of the heating equipment and the hot water equipment of the Borden Company? 260
A. The basement porter cleans up the basement and he can turn valves off and on if he is asked to. If he happens to be down there and the superintendent knows he is there and wants the heat turned on, he would call him.

Q. When these boilers are fired, who fires them? A. The New York Steam Company would take care of that.

Q. During the rest of the year these boilers are not used? A. No.

Q. What do the porters do in the main lobby of premises 350 Madison Avenue? A. They scrub the floor, clean all the metal work, clean the marble and the ceiling fixtures. That is all.

Q. What do they do on rainy days? A. The same thing. 261
They also roll out the rubber mat and put up the canopy.

Q. Do they have anything to do with the moving of furniture from outside to office space in the building? Supposing I wanted to have a desk sent in from outside, would the porters have to handle that? A. The outside people would bring it in.

Q. When there are alterations and changes in the Borden organization at 350 Madison Avenue, do the Borden porters move the furniture around to the new places? A. Yes.

Q. They assist in the alterations? A. They assist to this extent—we have the contractor come in and he makes all the necessary changes, plastering, etc., and he cleans up—broom-clean, as they call it. It's still pretty messy, and our porters go in and clean it up.

Q. Does this occur frequently? A. Fits and starts. A lot today, none for the next three months, something like that. Frequently during a year, you might say.

Q. Do you know the following persons: Charles J. Burke, Ole Hofseth, Walter C. Menyhart, James McCarthy, Michael November, Leonard Quinn, Thomas M. Treacy? A. Yes.

263 Q. What are their occupations? A. Elevator operators. They operate all the elevators at 350 Madison Avenue.

Q. Are all of these men elevator operators? A. Yes.

Q. Don't you have elevators assigned for the exclusive use of the Borden officials in this building? A. No.

Q. How many elevators are assigned to cover the floors from the ground floor to the twelfth floor? A. Four.

Q. Are there any tenants between the ground floor and the twelfth floor? A. Yes.

Q. Who are they? A. On the second floor, Eastman Kodak and Western Union. The American Society for the Prevention of Cancer, and James H. Ripley, on the sixth floor. On the seventh floor, a Dr. Fiske, Keystone Portland Cement, executive offices of Wally Frank. On the eighth floor, James J. Fitzgerald, Guy Wright, and
264 Recordak Corporation. On the ninth floor, Goslin-Birmingham, Beckett Paper Co., Manheimer Bros., Santee River Hardwood Co., and D. L. Fulton. On the tenth floor, Newgass & Nayfack, and Dr. Smith. The eleventh floor is Bordens. On the twelfth floor, Augusta Bliss Reese, W. W. Reese, Greendale Ferry Co., and Fox River Paper Co.

Q. Have these people occupied space in this building throughout the period from October 24, 1938 to May 1, 1942? A. A good part of it; maybe all of it. There might

be an expiration in there one way or another. We have some new ones down there.

Q. Have any who occupied space moved out since May 1, 1942? A. I wouldn't trust to memory on that.

Q. Can you approximate what percentage of the floor space from the ground floor to the twelfth floor was occupied by the Borden Company and its divisions? A. Approximately 75%.

Q. Do any one of these tenants manufacture goods in the premises? A. No.

Q. You know that of your own knowledge? A. Yes. It is in our lease that they should not manufacture any goods. We are an executive office building and manufacturing 266
would be against the zoning regulations of the building.

Q. What does Eastman Kodak do on the second floor? A. They keep records of their sales in their store down below on the first floor.

Q. What does Recordak Corporation do on the eighth floor? A. They have their executive offices for the machinery that they sell to banks. As I understand it, they take a photograph and shrink it down.

Q. Do they have a show room in the Recordak offices here? A. I guess they have. They have one of their machines there, and I suppose it is called a show room.

Q. Do they do any developing of their process in their offices? A. Only for experimental purposes, that I know of. They have a fellow down there who tinkers around 267
with some things. That is as far as I know. They have a big plant on 23rd Street.

Q. What is the American Society for the Prevention of Cancer? A. This is the head office. They go out and get appropriations and donations, and what not.

Q. Do you know whether they write any advertising material on the premises? A. They might. That is a question I wouldn't know.

Q. What does Ripley do? A. Just a personal office.

Q. What business is he in? A. He used to be an engineer. I don't know whether he is still an engineer or not.

Q. What offices does Dr. Fiske have here? A. 711 to 712.

Q. What is his profession? A. An osteopath.

Q. What is the business of the Keystone Portland Cement? A. This is a New York office. Their main office is in Philadelphia. This is their executive office. They don't manufacture anything here.

Q. What does Wally Frank do, on the seventh floor? A. He has his own personal office there, and a couple of assistants, for his various stores.

269 Q. What business is he engaged in? A. Pipes, and purveyors of tobacco.

Q. What business is James J. Fitzgerald in? A. That is another personal arrangement.

Q. What is the business of Guy Wright? A. Christian Science practitioner.

Q. What is Goslin-Birmingham? A. Sugar machinery. This is a branch office.

Q. Do they manufacture sugar machinery? A. Yes.

Q. These are the executive offices? A. No, it is a New York branch.

Q. Where do they have their main office? A. Birmingham, Alabama, I think.

Q. What is the business of the Beckett Paper Co.? A. They are manufacturers of paper stationery.

270 Q. Where are their plants? A. Out west. This is a branch office.

Q. What is the business of Manheimer Bros.? A. Real estate and law.

Q. What is the business of the Santee River Hardwood Co.? A. Lumber.

Q. Where is their main plant? A. St. Stephens; they have a branch office here.

Q. What is the business of D. L. Fulton? A. He is a milk broker.

Q. Any connection with the Borden Company? A. No.

Q. Dr. Smith is a dentist, and Newgass & Nayfack a law firm, on the tenth floor? A. Yes.

Q. What about Augusta Bliss Reese? A. It is an estate.

Q. W. W. Reese is connected with that office? A. Yes.

Q. What is the Greendale Ferry Co.? A. They are managers of ferry lines. The Port Washington to New Rochelle ferry was one of theirs.

Q. Do any of their ferry lines go across state lines? A. I don't know all the ferry lines that they have.

Q. Where does the Fox River Paper Co. have its plant? 272
A. Appleton, Wisconsin. They have a branch office here. The New York representative is here.

Q. Do you have elevators in the building for the tenants and for the Borden organization between the ground floor and the twelfth floor? A. Yes.

Q. Are the elevators used for the inter-floor and inter-office communication of the Borden organization? A. Yes.

Q. Are the staircases used for that same purpose? A. Yes.

Q. Do the porters clean the staircases? A. Yes.

Q. Do the porters clean the elevators? A. Yes.

Q. Do they also dry the elevator floors on rainy days? A. Yes.

Q. Do they also wax the linoleum on the elevator floors? 273
A. Yes.

Q. Do they clean the elevator doors and frame-work on each of the floors? A. That is part of their public space work.

Q. Do you issue any instructions with regard to the carrying of personnel of the Borden Company in the elevators in premises 350 Madison Avenue? A. No.

Q. How many other elevators do you have in the building? You mentioned four. A. We have four others.

Q. What floors do these elevators take care of? A. They run express from the ground floor to the eleventh floor, and from then on local to the top of the building.

Q. What tenants are there on the floors from the thirteenth floor on? A. On the thirteenth floor would be Hurdman & Cranstoun.

Q. What business are they in? A. Certified public accountants. On the fourteenth would be Richard B. Carter.

Q. What business are they in? A. Personal. Then there is William H. Davis. They have charge of advertising in some military magazine. There is Frank Crawford. He is an importer and exporter. Ronald Grose and Pittsburgh
275 & Shawmut Coal Co. Ronald Grose is a Christian Science practitioner. Pittsburgh & Shawmut Coal Co. is in the coal business, in Pennsylvania. This is a branch office. Louis J. Snyder—that is personal, I don't know what he does. On the fifteenth floor, Herman Duval, insurance. William H. Gale, Christian Scientist. I. Koffenburgh & Sons, leaf tobacco brokers. Safety Equipment Manufacturing Association—that is an association for automobile safety equipment. On the sixteenth would be Hartwell Ayles, advertising, and A. B. Chance, machinery. This is a branch office. Their main office is out west somewhere. Eighteenth is J. O. Ross, engineering. Nineteenth, Lester Holmes, attorney. J. J. Arnold. F. & J. Weiss, real estate and law practice. Julia M. Johnston, Christian Scientist. On the twentieth floor, Robert Boyd Ward Fund.
276 That is a fund set up by the Ward baking man. Weed & Co., radio advertising. Jeanne Trimmer, Harper method for men. Twenty-first, H. A. Florsheim—a yarn broker. Mrs. McConemy, a Christian Science practitioner. K. DeLacy-Bourke—I think that is just personal. Mitchell & Van Winkle, lawyers. Allied Board of Trade—that is a company for the fabric trade here in New York. On the twenty-second, there is the Standard Stoker Company,

branch office, manufacturers of stokers for railroads. Their main manufacturing plant is in Erie, Pennsylvania. McLean, Ferris & Ely, lawyers. Bernitz Furnace Company, manufacturers of furnace equipment. Their main office is in Boston. On the twenty-third floor, Arnold, Hoffman & Co. That is a manufacturing company. Their main office is in Providence, Rhode Island. Their business is machinery and paints. Cordage Institute—that is an association for the cord and rope industry. There is Western States Machine Company. They are manufacturers of sugar machinery, and their main office is in Wisconsin. That is all I can think of.

Q. What about the pent house? A. The Phoenix Art 278
Institute, an art school, used to be there, but they're out.

Q. The tenants you describe as occupying space above the twelfth floor in premises 350 Madison Avenue, are they the people who occupied the space there from October 24, 1938 to May 1, 1942? A. Yes.

Q. Approximately how much space above the twelfth floor did the Borden Company occupy? A. Not very much—about 25%.

Q. How much of the whole building is occupied by the Borden Company? A. 57%.

Q. Is that based on feet? A. Yes.

Q. Do any of these advertising agents in the building do work for the Borden Company? A. No.

Q. Do they write copy in this building? A. Ayles is 279
more of a display man.

Q. Does he draft the layouts of display advertising? A. I suppose he does.

Q. Do Weed & Company write script? A. No. What they do is really represent. They are radio representatives. As I understand their business, they have a certain number of stations tied up, and if you want to advertise on that certain hook-up you go to Weed & Company and they will give you the time that is available.

280 *Plaintiffs' Exhibit 2—Deposition of Marshall.*

Q. They represent the station, in other words? A. Yes.

Q. Do you know the following persons: William L. De Graaf, John B. Donegan, William Kay and Jesus Echevaria? A. Yes.

Q. Were they employed by the Borden Company for the period from October 24, 1938 to May 1, 1942? A. Yes.

Q. What were their duties? A. Night watchmen at premises 350 Madison Avenue.

Q. In detail, what were their duties? A. We have seventy-four stations called "Watchman's Keys" distributed around various parts of the building, ranging from the top floor motor room to the basement, and at certain hours they
281 have their clocks with them and they go up and punch their clocks with these keys, in rotation, all the way down. That is all.

Q. Are they supposed to go into the various offices and see if everything is all right? A. Only if they have a watchman's key.

Q. Would you say that the purpose of having watchmen in the building is to protect the building and its contents from fire and theft? A. Yes.

Q. Do they do anything else besides the activities you just mentioned? A. When the women cleaners come in, one of the watchmen will take the women up to the various floors.

Q. Don't they have something to do with permitting
282 employees of the Borden Company to enter the offices of the Borden Company at 350 Madison Avenue after office hours? A. That is about the only other thing. They will insist that every person entering the building sign a regular building night register on the ground floor before going up into the building, and also signing on departure.

Q. During what period is that? A. After 7 o'clock at night and on Sundays.

Q. During those periods they operate the elevators? A. No. We have a regular man for that; a night elevator operator.

Q. Do any of these maintenance employees have anything to do with the moving of freight in or out of the building? A. What do you mean by freight?

Q. I mean furniture, office equipment, merchandise being sent from outside to tenants in the building, samples of the Borden products from the office of the Borden Company elsewhere. A. That's possible. I can't tell you any specific cases. Let's put it this way—that if somebody, either Borden or tenant, wants to send something out of the building, they might be asked to take it downstairs until the express man will call for it. It could be anything. If you wanted to crate that chair up and send it somewhere, you would ask for a porter to take it downstairs. 284

Q. Who runs the elevator from the basement of the building to the street level on the 45th Street side of the Borden building? A. Porters and stock room clerks.

Q. You mentioned stock room before. Who is in charge of the stock room? A. Right now it's Thomas Lo Sasso. Before that it was a fellow by the name of Charles Fromm.

Q. What does the Borden Company have in the stock room? A. Supplies for this building—lamps, soap, electrical outlets, switches, wire, nuts, bolts, and anything that would pertain to the operation of the building.

Q. Would that be for the convenience of tenants as well as the Borden Company? A. The whole building.

Q. Is there anything else in the basement of the Borden building which you haven't mentioned before? A. There's a mechanics shop, vaults for the Borden Company which nobody goes into. The disbursements department has a vault and they are the only ones who have the key to it. 285

Q. You mean the disbursements division of the accounting department of the Borden Company? A. Yes.

Q. About how large is that vault? A. 10 x 20.

Q. Who has a key to that vault? A. Various Borden departments. The treasurer's office has a vault there, the real estate office, the secretary's office, the disbursements division.

Q. Is that vault an exclusive Borden activity? A. Yes.

Q. When records are destroyed in the water boiler in the Borden building, are the records taken from this vault or from various divisions of the Borden Company in the building? A. I would say both. Some employees might come down from the various departments that have these vaults and ask to have the records removed.

Q. What machinery do you have in the basement of the Borden building? A. We have a pump room, which is machinery for the building. That pumps the water up to the tanks on the roof. We have a vacuum pump for the heating system. We have a blower motor down there for ven-
287 tilation. We have a number of little motors down there for ventilation purposes.

Q. Who would be in charge of those motors? A. Mechanics.

Q. Would any of the maintenance men operate these machines? A. No. They might clean them, but not actually operate them. Of course a good many of them are mechanical.

Q. Do any of the maintenance men have anything to do with the photostat department on the 10th floor of this building? A. They are asked to go in and mop up the floor about once a week, ten days or two weeks.

Q. Don't they clean the paper scraps that result from the work done? A. They're all put in a big barrel or con-
288 tainer and put out by the elevator, and they take them down at night.

Q. Do they have anything to do with the supplying of power for the machinery in the photostat department? A. No.

Q. Is that connected with the regular electrical work in the building? A. Yes.

Q. How about the fluids that are used in that department? A. It is poured down the drains.

Q. Do they bring in all the raw materials to the photostat plant on the tenth floor? A. Yes, they would do that. It comes up in crates and they dump it off on the floor and then the photostat boys take care of it from there.

Q. Would these crates be brought up on the elevators? A. Yes.

(Sgd.) RAYMOND V. MARSHALL
Raymond V. Marshall

Sworn to before me this
20th day of July, 1943.

(Notary seal) 290

(Sgd.) ROSEMARY PURCELL
Notary Public,
Queens County
Queens Co. Clk's No. 1867, Reg. No. 1005
Certificate Filed in
N. Y. Co. Clk's No. 88, Reg. No. 4-P-52
Commission expires March 30, 1944.

I, BESSIE MILLER SCHWARTZ, the officer before whom the foregoing deposition was taken, do hereby certify that the witness, whose testimony appears in the foregoing deposition, was duly sworn by me and that said deposition is a 291 true record of the testimony given by the said witness.

(Sgd.) BESSIE MILLER SCHWARTZ
Bessie Miller Schwartz

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Defendant's Exhibit A.

Affidavit of Stephen Everett Wyman.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

293

STEPHEN EVERETT WYMAN, being duly sworn, deposes and says:

I am Controller of the Manufactured Products Division of The Borden Company and Regional Accountant for several companies and divisions of The Borden Company.

I have heretofore testified in this action before Bessie M. Schwartz, a Notary Public. My deposition was duly sworn to on August 3, 1943, and I have been informed that the same is on file herein.

On page 36 of said deposition I testified that there is a photostat and photo offset department on the tenth floor of The Borden Company building at No. 350 Madison Avenue, New York, New York. There are and have been at

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all times mentioned in the Complaint not more than six employees employed in said department. There are 822 employees employed by The Borden Company in the building at No. 350 Madison Avenue.

The equipment in this department is used for making copies of statements, reports and instructions which are not sold but are transmitted to offices and plants of the defendant and its subsidiaries.

Defendant's Exhibit A—Affidavit of Wyman. 295

Annexed hereto and made a part hereof is a statement of the relation of the cost of photostat and photo offset work sent from No. 350 Madison Avenue to Borden Company plants outside the State of New York to the gross sales and the net sales of The Borden Company.

STEPHEN EVERETT WYMAN,

Sworn to before me this
2nd day of September, 1943.

WM. H. THOMAS,
Notary Public,
New York County.

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RELATION OF PHOTOSTAT & PHOTO-OFFSET COSTS TO COMPANIES AND DIVISIONS OUTSIDE OF NEW YORK STATE TO THE GROSS SALES AND NET SALES OF THE BORDEN CO.

	Photostat & Photo-offset Costs	*Gross Sales*	*% of Gross Sales*	*Net Sales*	*% of Net Sales*
Year 1938 (Nov & Dec only)	$ 236.24	$ 33,405,111.91	.00000707	$ 32,405,704.76	.00000729
Year 1939	1,257.08	208,789,250.58	.00000602	202,272,796.03	.00000621
Year 1940	1,159.80	216,795,850.86	.00000535	209,439,970.13	.00000554
Year 1941	1,243.53	259,128,514.71	.00000480	251,050,606.91	.00000495
Year 1942 (Jan 1st to Apr 30th)	682.98	95,472,963.21	.00000715	93,027,551.98	.00000734

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Defendant's Exhibit B.

Affidavit of Raymond V. Marshall.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

RAYMOND V. MARSHALL, being duly sworn, deposes and says: 302

I am the Building Manager of The Borden Company building located at No. 350 Madison Avenue, New York. New York.

I have heretofore testified in this action before Bessie M. Schwartz, a Notary Public. My deposition was duly sworn to on July 20, 1943, and I have been informed that the same is on file herein.

The total rentable area of premises No. 350 Madison Avenue is 198,018 square feet.

As of April, 1942, The Borden Company occupied 115,710 square feet.

The photostat and photo offset department occupies 1,781 square feet. This figure is .0153 of the total area occupied by The Borden Company. 303

RAYMOND V. MARSHALL.

Sworn to before me this
1 day of September, 1943.

EDWARD A. WASEMIN,
Notary Public,
New York County.

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Opinion of Judge Conger.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

NEWGASS & NAYFACK, Esquires, Attorneys for plaintiffs, GEORGE W. NEWGASS, NATHAN COOPER, and LEO H. HIRSCH, JR., of Counsel.

MILBANK, TWEED & HOPE, Esquires, and JOHN A. KELLY, Esquire, Attorneys for Defendant, JOHN A. KELLY and
305 GEORGE F. KEENAN, of Counsel.

EDWARD A. CONGER, *U. S. D. J.*

The plaintiffs bring this action, which was tried before the court without a jury, on their own behalf and on behalf of other employees of the defendant similarly situated. The action against the defendant is brought to recover overtime compensation and an equal amount as liquidated damages plus a reasonable attorney's fee pursuant to Section 16 (b) of the Fair Labor Standards Act of 1938 (29 U. S. C. A. Sec. 216 (b)).

Jurisdiction is conferred upon this Court by virtue of Section 24 (8) of the Judicial Code (28 U. S. C. A. Sec. 41 (8)).

There are no facts in dispute.
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The defendant is a foreign corporation, organized under the laws of New Jersey, licensed to do business in this state and doing business in this district. It is the owner of a building located at 350 Madison Avenue, New York City, of which it occupies, in whole or in part, approximately seventeen of the twenty-four floors of the building in connection with the operation of its business. The head office of the defendant is located in this building, and the

defendant occupies approximately 58% of the total rentable area of the building.

The plaintiffs are employed in connection with the operation and maintenance of the building as porters, watchmen, elevator operators, etc.

Plaintiffs contend that defendant is engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act. It bases this contention on two grounds. First: That defendant is engaged in the physical production of goods on the premises.

With respect to this claim, there are only two facts that merit attention. One is that ideas and rough drafts for labels, which are to be affixed to the products of the defendant and for advertising material for use throughout the country and abroad, emanate from this building. 308

The other is that the photostatic plant maintained by the defendant in the building is engaged in the production of goods and 5 percent of its output is shipped across state lines.

I can't convince myself that either of these activities constitute "production of goods" as defined by the Act.

These activities, however, may and should be considered in connection with the real question presented here and that is whether the nature of the business carried on by the defendant at 350 Madison Avenue is such that plaintiffs may be said to be engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act. Defendant concedes that it is engaged in interstate commerce, but it denies that it is engaged in the production of goods at 350 Madison Avenue in New York City. 309

Defendant's business consists mainly in the sale and distribution of fluid, condensed and evaporated milk, casein, ice cream, butter, cheese and the products manufactured from milk. These products are processed, prepared or manufactured at factories and plants located throughout the United States and distributed from the plants and factories.

The actual production of goods for commerce is carried on in buildings separated entirely from 350 Madison Avenue.

The business of defendant is national and international.

At 350 Madison Avenue are the offices of the executives of the defendant, together with other employees (clerical), and the maintenance employees. It is the home office of the defendant and here are the various departments which direct and supervise the entire business of defendant.

In this building is the accounting department, with its various divisions; the sales division, the credit department, the traffic division, the legal department, the safety division; the Board of Directors hold their regular and special meetings here.

311

Notwithstanding all this, no "goods, wares, products, commodities, merchandise or articles or subjects of commerce of any character or any part or ingredient thereof * * * are produced, manufactured, handled or in any other manner worked on", in this office building.

I can only conclude that defendant at 350 Madison Avenue is not engaged in the production of goods for commerce but are engaged in interstate commerce.

We now must pass on to the status of these plaintiffs. The question now presents itself: Are they engaged in interstate commerce? On this question, the nature of plaintiffs' activities is controlling and not the business of the employer.

312

There are two classes of employees contemplated by the Act; those engaged in the production of goods for commerce and those engaged in commerce.

The Act itself makes a difference between the two. As to the second, the Act limits it to those actually engaged in commerce, but as to the first class there is no limitation. It covers, not only those who participate in the physical process of the making of the goods, but also those employees

engaged in any process or occupation necessary to the production.

It was as to the status this second class of employees, that the Supreme Court passed on in *Kirschbaum* v. *Walling*, 316 U. S. 517. Plaintiffs may not invoke that decision in support of their claim. They are in the other class, i.e. those engaged in commerce.

I am satisfied that this case comes within the reasoning, *Stoike* v. *First National Bank of the City of New York*, 290 N. Y. 195.

This question is passed on fairly and squarely and all of the recent Supreme Court decisions on this point are discussed and analyzed. Among other things, the Court of 314
Appeals said:

> "We think that in framing section 7 (subd. a) of the Act Congress intended definitely to distinguish between the scope of those categories of employees which it described as being 'engaged in commerce' and those engaged 'in the production of goods for commerce.' The phrase 'in commerce' was not intended to include within its scope that wide field of activities which remotely *affect* interstate commerce. Whenever Congress, acting under the commerce clause, has wanted to embrace that broader field it has definitely expressed that purpose."

See also 315

Johnson v. *Dalls Downtown Development Co.*, 132 Fed. (2d) 287.

Hinkler v. *Eighty-three Maiden Lane Corp.*, 50 F. Supp. 263.

Callus v. *10 East Fortieth Street Bldg.*, 51 F. Supp. 528.

McLeod v. *Threlkeld*, 319 U. S. 491.

The Supreme Court in this last case laid down this rule:

> "The test under this present act, to determine whether an employee is engaged in commerce, is not whether the employee's activities affect or indirectly relate to interstate commerce but whether they are actually in or so closely related to the movement of the commerce as to be a part of it. Employee activities outside of this movement, so far as they are covered by wage-hour regulation, are governed by the other phrase, 'production of goods for commerce'."

317 In the light of the provisions of the Act and the authorities construing the Act, I can only conclude that the work of these plaintiffs is not so closely allied to the activities carried on in the building at 350 Madison Avenue that these employees may be said to be engaged in interstate commerce.

I find that the plaintiffs are not within the coverage of the Act.

Judgment for the defendant on the merits with costs.

Dated: New York, New York, December 7, 1943.

EDWARD A. CONGER,
United States District Judge.

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319

Defendant's Proposed Findings of Fact and Conclusions of Law.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

The defendant submits the following proposed Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. That the defendant is a foreign corporation organized 320
and existing under and by virtue of the laws of the State of New Jersey.

2. That the defendant is licensed to do business and is doing business in the State of New York and in the Southern District of New York.

3. That the defendant is engaged in the business of processing, manufacturing, selling and distributing fluid, condensed, and evaporated milk, casein, ice cream, butter, cheese and various other products.

4. That the defendant does business throughout the United States and in foreign countries.

321

5. That the defendant owns and operates plants and factories in the United States and Canada where it processes, manufactures, sells and distributes its products.

6. That the defendant owns a twenty-four story office building at No. 350 Madison Avenue, in the City, County and State of New York.

322 *Defendant's Proposed Findings.*

7. That the plaintiffs are building maintenance employees, namely, porters, elevator operators and watchmen who were employed by the defendant in connection with the operation and maintenance of said building.

8. That the defendant maintains its home office in said building and occupies, in whole or in part, approximately seventeen of the twenty-four floors and 58% of the total rentable area.

9. That the President, Executive Vice-President, Vice-Presidents, Treasurer and Assistant Treasurers, Secretary
323 and Assistant Secretaries and other officers of the defendant are housed in said building; that the employees in the General Accounting, Public Accounting, Cashier's, Photostat, Central Transcribing, Stationery, Sales, Credit, Traffic, Legal, Safety, Mailing, Labelling, Income Tax, Stock, Purchasing, Public Relations, Employee Relations, Advertising, Insurance, Industry Relations, and Real Estate Departments are likewise housed therein; and the Board of Directors of the defendant hold their regular and special meetings therein.

10. That the defendant directs, supervises, manages and controls its entire business through the aforesaid directors, officers and employees.

324 11. That the ideas regarding the form and contents of advertisements used by the defendant in advertising its products originate in said building and also in the various operations of The Borden Company located outside said building; and the rough and final drafts of said advertisements are likewise prepared in said building and in the various operations of The Borden Company outside said building; and none of the advertising is printed in or distributed from said building.

12. That the ideas regarding the form and contents of the labels which are affixed to The Borden Company products originate in said building and also the various divisions of The Borden Company located outside said building; and drafts of said labels are likewise prepared in said building and in various divisions of The Borden Company located outside said building; and none of said labels are printed in or distributed from said building.

13. That said Photostat Department, maintained and operated by the defendant in said building, occupies 1,781 square feet or .0153 percent of the total area occupied by the defendant in said building; that not more than six 326
employees are employed in said department; that as of April 30, 1942 the cost of the machinery and equipment in said department was the sum of $12,750.75.

14. That the employees in said department are engaged in making copies of statements, reports and instructions which are transmitted exclusively to the offices and plants of the defendant and its subsidiaries, and none of which are sold or offered for sale.

15. That from October 24, 1938 to December 31, 1938, 5.26 per cent. of these statements, reports and instructions were transmitted to points outside the State of New York; in the year 1939, 5.38 per cent.; in the year 1940, 4.13 per cent.; in the year 1941, 3.99 per cent.; and in the year 1942, 327
4.41 per cent.

16. That the defendant does not produce, manufacture, handle, process or in any other manner work on any goods in said building.

17. That the remainder of said building not occupied by The Borden Company is occupied pursuant to written agreements of lease by various persons, firms, partnerships, associations and corporations.

18. That none of said tenants produce, manufacture, handle, process or in any other manner work on any goods in said building.

CONCLUSIONS OF LAW

1. That the defendant is engaged in interstate commerce at premises No. 350 Madison Avenue, in the City, County and State of New York.

2. That the defendant is not engaged in the production of goods for commerce at premises No. 350 Madison Ave-
329 nue, in the City, County and State of New York.

3. That the tenants of the defendant are not engaged in the production of goods for commerce at premises No. 350 Madison Avenue, in the City, County and State of New York.

4. That the plaintiffs are not engaged in interstate commerce.

5. That the plaintiffs are not engaged in the production of goods for interstate commerce or in any process or occupations necessary to the production thereof.

6. The plaintiffs are not within the coverage of the Fair
330 Labor Standards Act.

7. The defendant should have judgment against the plaintiffs on the issues in this action on the merits.

I hereby order and direct that a judgment be entered accordingly.

331

Plaintiffs' Exceptions to Proposed Findings of Fact and Conclusions of Law of Defendant and Plaintiff's Proposed Findings of Fact and Conclusions of Law.

UNITED STATES DISTRICT COURT;

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

The plaintiffs take exception to the defendant's proposed Findings of Fact numbered "11", "12", "16", and to the defendant's proposed Conclusions of Law numbered "2", "4", "5", "6" and "7".

332

The plaintiffs submit the following proposed Findings of Fact:

7a. That unlike elevators in an ordinary office building, the elevators in the said building are regularly employed as a vital connecting link between the various departments of defendant's organization; that said elevators are engaged in carrying defendant's office employees on inter-office business in the said building.

7b. That unlike elevators in an ordinary office building, the elevators in the said building are regularly employed in carrying reports, ediphone disks and raw and finished products to and from the defendant's photostat and photo-offset plant on the tenth floor of said building.

333

7c. That the plaintiffs are employed in an occupation necessary to the carrying on by the defendant's directors, officers and employees housed in said building, of their respective duties, which duties include either the production of goods in the said building for interstate commerce or activities necessary to the carrying on by the defendant of

production for commerce in defendant's plants and factories in various parts of the United States and Canada.

9. That the President, Executive Vice-President, Vice-Presidents, Treasurer and Assistant Treasurers, Secretary and Assistant Secretaries and other officers of the defendant are housed in said building; that the employees in the Manufacturing Department and in the General Accounting, Public Accounting, Cashier's, Photostat, Central Transcribing, Stationery, Sales, Credit, Traffic, Legal, Safety, Mailing, Labelling, Income Tax, Stock, Purchasing, Public Relations, Employee Relations, Advertising, Insurance, In-
335 dustry Relations, and Real Estate Departments are likewise housed therein; and the Board of Directors of the defendant hold their regular and special meetings therein.

10a. That the factory and plant superintendents have no discretion in the operation of their respective plants and factories, and all production activities are entirely controlled from the Manufacturing Department in the said building.

10b. That the defendant's Manufacturing Department on the seventh floor of the said building is engaged in the following activities in the said building: Issues running instructions to the superintendents of defendant's plants and factories with respect to the operation of said plants
336 and factories; controls the supply of raw materials for every plant and factory and purchases the same; directs when production at a plant or factory should increase or decrease and when a product should be manufactured or discontinued; directs plant expansion and contraction and purchases new equipment for said plants and factories; sets the budgets for the plants and factories; establishes accounting systems at said plants and factories and an accounting control system at the home offices of the defend-

ant in the said building; maintains a staff of engineers who inspect the plants and factories from an efficiency standpoint and report their findings to the home offices.

10c. That the defendant produces its own stationery in the said building. While the actual printing is done in another building, the stationery, letterheads and other printed matter are designed and written in said building. After printing, the products are sent across state lines.

10d. That defendant produces in the said building, among other things, stockholders' reports, balance sheets and other accounting and financial reports. 338

10e. That the plants and factories of the defendant throughout the United States and Canada are completely directed, controlled and supervised by the defendant through defendant's directors, officers and employees housed in the said building.

11. That the ideas regarding the form and contents of advertisements used by the defendant in advertising its products originate in said building; and the rough and final drafts of said advertisements are likewise prepared in said building; none of the advertising is printed in or distributed from said building.

12. That the ideas regarding the form and contents of 339
the labels which are affixed to the Borden Company's products originate in said building; and drafts of said labels are likewise prepared in said building; none of said labels are printed in or distributed from said building.

16. That the defendant's aforesaid directors, officers and employees housed in defendant's said building are employed in occupations necessary to the carrying on by the defend-

340 *Plaintiffs' Exceptions and Proposed Findings.*

ant of production in defendant's plants and factories in various parts of the United States and Canada.

16a. That the defendant's aforesaid directors, officers and employees housed in said building are engaged in producing, manufacturing, handling, and in other manners working on goods in said building.

16b. That the plaintiffs are engaged in producing, manufacturing, handling, and in other manners working on goods in the said building within the meaning of the Fair Labor Standards Act.

341 The plaintiffs submit the following proposed Conclusions of Law:

2. That the defendant is engaged in the production of goods for commerce at premises No. 350 Madison Avenue, in the City, County and State of New York.

4. That the plaintiffs are engaged in interstate commerce.

5. That the plaintiffs are engaged in the production of goods for interstate commerce and in occupations necessary to the production thereof.

6. That plaintiffs are within the coverage of the Fair
342 Labor Standards Act.

7. The plaintiffs should have judgment against the defendant on the issues in this action on the merits.

343

Defendant's Objections to Plaintiffs' Proposed Findings of Fact and Conclusions of Law.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

The defendant submits the following objections to the proposed findings of fact and conclusions of law submitted by the plaintiffs:

1. Defendant objects to plaintiffs' proposed findings of fact numbers 7a and 7b on the ground that such proposed 344
findings are not warranted by the evidence, there being no proof that the elevators in defendant's building are unlike elevators in ordinary office buildings.

2. Defendant objects to plaintiffs' proposed finding of fact number 7c on the ground that the same is contrary to the evidence and contrary to the Court's opinion following the trial herein.

3. Plaintiffs' proposed finding of fact number 9 is not objected to.

4. Defendant objects to plaintiffs' proposed finding of fact number 10a on the ground that it is not supported by 345
the evidence.

5. Defendant objects to plaintiffs' proposed finding of fact number 10b on the ground that the same is not supported by the evidence. On the contrary, the evidence establishes (Wyman's deposition, pp. 43, 44) that the activities of the Manufacturing Department on the seventh floor of defendant's building do not embrace or include fluid milk or ice cream.

346 *Defendant's Objections.*

6. Defendant objects to plaintiffs' proposed findings of fact numbers 10c and 10d on the ground that the same are contrary to the evidence and this Court's said opinion.

7. Defendant objects to plaintiffs' proposed finding of fact number 10e on the ground that the same is not supported by the evidence.

8. Defendant objects to plaintiffs' proposed findings of fact numbers 11 and 12 in that said proposed findings limit the origination of ideas as to the form and contents of advertisements and labels to defendant's building at 350 Madison Avenue, whereas defendant's proposed findings of fact numbers 11 and 12 state the facts in this regard as established by the evidence.

9. Defendant objects to plaintiffs' proposed findings of fact numbers 16, 16a and 16b on the ground that they are erroneous conclusions of law, are contrary to the evidence and this Court's said opinion.

10. Defendant objects to plaintiffs' proposed conclusions of law on the ground that the same are erroneous and contrary to this Court's said opinion.

All of which is respectfully submitted.

348 MILBANK, TWEED & HOPE
and
JOHN A. KELLY,
Attorneys for Defendant.

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Findings of Fact and Conclusions of Law.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

EDWARD A. CONGER, *U. S. D. J.*

This action having been tried by the Court, without a jury, the Court hereby makes the following Findings of Fact and Conclusions of Law:

1. That the defendant is a foreign corporation organized 350
and existing under and by virtue of the laws of the State of New Jersey.

2. That the defendant is licensed to do business and is doing business in the State of New York and in the Southern District of New York.

3. That the defendant is engaged in the business of processing, manufacturing, selling and distributing fluid, condensed, and evaporated milk, casein, ice cream, butter, cheese and various other products.

4. That the defendant does business throughout the United States and in foreign countries.

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5. That the defendant owns and operates plants and factories in the United States and Canada where it processes, manufactures, sells and distributes its products.

6. That the defendant owns a twenty-four story office building at No. 350 Madison Avenue, in the City, County, and State of New York.

7. That the plaintiffs are building maintenance employees, namely, porters, elevator operators and watchmen who were employed by the defendant in connection with the operation and maintenance of said building.

8. That the defendant maintains its home office in said building and occupies, in whole or in part, approximately seventeen of the twenty-four floors and 58% of the total rentable area.

9. That the President, Executive Vice-President, Vice-Presidents, Treasurer and Assistant Treasurers, Secretary and Assistant Secretaries and other officers of the defend-
353 ant are housed in said building; that the employees in the Manufacturing Department, General Accounting, Public Accounting, Cashier's, Photostat, Central Transcribing, Stationery, Sales, Credit, Traffic, Legal, Safety, Mailing, Labelling, Income Tax, Stock, Purchasing, Public Relations, Employee Relations, Advertising, Insurance, Industry Relations, and Real Estate Departments are likewise housed therein; and the Board of Directors of the defendant hold their regular and special meetings therein.

10. That the defendant directs, supervises, manages and controls its entire business through the aforesaid directors, officers and employees.

354 11. That the ideas regarding the form and contents of advertisements used by the defendant in advertising its products originate in said building and also in the various operations of The Borden Company located outside said building; and the rough and final drafts of said advertisements are likewise prepared in said building and in the various operations of The Borden Company outside said building; and none of the advertising is printed in or distributed from said building.

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12. That ideas regarding the form and contents of the labels which are affixed to The Borden Company products originate in said building, and drafts of said labels are likewise prepared in said building and none of said labels are printed in or distributed from said building.

13. That said Photostat Department, maintained and operated by the defendant in said building, occupies 1,781 square feet or .0153 per cent. of the total area occupied by the defendant in said building; that not more than six employees are employed in said department; that as of April 30, 1942 the cost of the machinery and equipment in said department was the sum of $12,750.75.

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14. That the employees in said department are engaged in making copies of statements, reports and instructions which are transmitted exclusively to the offices and plants of the defendant and its subsidiaries, and none of which are sold or offered for sale.

15. That from October 24, 1938 to December 31, 1938, 5.26 per cent. of these statements, reports and instructions were transmitted to points outside the State of New York; in the year 1939, 5.38 per cent.; in the year 1940, 4.13 per cent.; in the year 1941, 3.99 per cent.; and in the year 1942, 4.41 per cent.

16. That the defendant does not produce, manufacture, handle, process or in any other manner work on any goods in said building.

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17. That the remainder of said building not occupied by The Borden Company is occupied pursuant to written agreements of leases by various persons, firms, partnerships, associations and corporations.

18. That none of said tenants produce, manufacture, handle, process or in any other manner work on any goods in said building.

CONCLUSIONS OF LAW

1. That the defendant is engaged in interstate commerce at premises No. 350 Madison Avenue, in the City, County and State of New York.

2. That the defendant is not engaged in the production of goods for commerce at premises No. 350 Madison Avenue, in the City, County and State of New York.

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3. That the tenants of the defendant are not engaged in the production of goods for commerce at premises No. 350 Madison Avenue, in the City, County and State of New York.

4. That the plaintiffs are not engaged in interstate commerce.

5. That the plaintiffs are not engaged in the production of goods for interstate commerce or in any process or occupations necessary to the production thereof.

6. The plaintiffs are not within the coverage of the Fair Labor Standards Act.

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7. The defendant should have judgment against the plaintiffs on the issues in this action on the merits.

I hereby order and direct that a judgment be entered accordingly.

EDWARD A. CONGER,
United States District Judge.

Dated: New York, New York, January 13, 1944.

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Final Judgment.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

The issues on this action having been duly brought on for trial before Honorable Edward A. Conger, one of the District Judges of the District Court, Southern District of New York, without a jury, at the United States Courthouse, Foley Square, New York, N. Y., on the 19th day of October, 1943, and on motion of the attorneys for the plaintiffs in open court Jesus Echevarria was brought in as an additional party plaintiff, and by further order of the court the action was discontinued as to all parties plaintiff except plaintiffs Joseph Borella, Charles J. Burke, Walter Cross, William L. DeGraaf, John B. Donegan, Stanley Gajda, Edward Gramcko, Stanley Grzeck, Ole Hofseth, William Kay, Alexander Krupica, William Lendo, Thomas Lo Sasso, Robert A. Marshall, Walter C. Menyhart, James McCarthy, Michael November, Leonard B. Quinn, Andrew Rueb, Thomas M. Treacy, and Jesus Echevarria, and they having appeared by counsel and the defendant having appeared by counsel, and the proofs of the parties having been duly heard and considered and the court having directed that the defendant should have judgment against the plaintiffs on the issues in this action on the merits with costs, and the court having filed its findings of fact and conclusions of law on January 13, 1944, and the costs of the defendant having been duly taxed in the sum of $28.75

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Now, on motion of Milbank, Tweed & Hope, and John A. Kelly, attorneys for the defendant, it is

ADJUDGED that the defendant have judgment against the plaintiffs Joseph Borella, Charles J. Burke, Walter Cross,

364 *Final Judgment.*

William L. DeGraaf, John B. Donegan, Stanley Gajda, Edward Grameko, Stanley Grzeck, Ole Hofseth, William Kay, Alexander Krupica, William Lendo, Thomas Lo Sasso, Robert A. Marshall, Walter C. Menyhart, James McCarthy, Michael November, Leonard B. Quinn, Andrew Rueb, Thomas M. Treacy, and Jesus Echevarria, on the issues in this action on the merits with costs and that the defendant do recover of plaintiffs Joseph Borella, Charles J. Burke, Walter Cross, William L. De Graaf, John B. Donegan, Stanley Gajda, Edward Grameko, Stanley Grzeck, Ole Hofseth, William Kay, Alexander Krupica, William Lendo, Thomas Lo Sasso, Robert A. Marshall,
365 Walter C. Menyhart, James McCarthy, Michael November, Leonard B. Quinn, Andrew Rueb, Thomas M. Treacy, and Jesus Echevarria; care of Newgass & Nayfack, 350 Madison Ave. N. Y., N. Y., the sum of $28.75 costs as taxed and that execution issue accordingly.

Dated: February 16, 1944.

Approved

EDWARD A. CONGER,
U. S. D. J.

Judgment rendered,
GEORGE J. H. FOLLMER,
366 Clerk.

Feb. 17, 1944.

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Notice of Appeal.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JOSEPH BORELLA, CHARLES J. BURKE, WALTER CROSS, WILLIAM L. DEGRAAF, JOHN B. DONEGAN, STANLEY GAJDA, EDWARD GRAMCKO, STANLEY GRZECK, OLE HOFSETH, WILLIAM KAY, ALEXANDER KRUPICA, WILLIAM LENDO, THOMAS LO SASSO, ROBERT A. MARSHALL, WALTER C. MENYHART, JAMES MCCARTHY, MICHAEL NOVEMBER, LEONARD B. QUINN, ANDREW RUEB, THOMAS M. TREACY, and JESUS ECHEVARRIA,

Plaintiffs,

against

THE BORDEN COMPANY,

Defendant.

Civil Action
File No. 20-425

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NOTICE IS HEREBY GIVEN that the plaintiffs above named hereby appeal to the Circuit Court of Appeals for the Second Circuit from the final judgment in this action dated February 16, 1944 and entered February 17, 1944, and from each and every part of said judgment as well as from the whole thereof.

Dated: New York, N. Y., February 28, 1944.

369

NEWGASS & NAYFACK,
Attorneys for Appellants,
350 Madison Avenue,
New York, N. Y.

370 *Notice of Appeal.*

To:

MILBANK, TWEED & HOPE, Esqs.,
and JOHN A. KELLY, Esq.,
Attorneys for Defendant,
15 Broad Street,
New York, N. Y.

HON. GEORGE J. H. FOLLMER,
Clerk of the United States District Court
For the Southern District of New York.

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371 **Stipulation as to Contents of Record.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

IT IS HEREBY AGREED AND STIPULATED by and between the attorneys for the respective parties hereto, as follows:

1. Pursuant to Rule 75-f of the Federal Rules of Civil Procedure, the parts of the record, proceedings and evidence to be included in the record on appeal shall be the following:

372 a) A statement under Rule 13 of the General Rules of the United States Circuit Court of Appeals for the Second Circuit;

b) Summons;

c) Complaint;

d) Answer;

e) Deposition of Stephen Everett Wyman;

f) Deposition of Raymond V. Marshall;

g) Affidavit of Stephen Everett Wyman, sworn to September 2, 1943;

h) Affidavit of Raymond V. Marshall, sworn to September 1, 1943;

i) Opinion of Judge Edward A. Conger;

j) Defendant's proposed findings of fact and conclusions of law;

k) Plaintiffs' exceptions to proposed findings of fact and conclusions of law of defendant, and plaintiffs' proposed findings of fact and conclusions of law, and defendant's objections to plaintiffs' proposed findings of fact and conclusions of law;

l) Findings of fact and conclusions of law; 374

m) Final judgment;

n) Notice of appeal;

o) This stipulation.

2. The reporter's transcript of the proceedings at the trial shall not be included in said record on appeal.

3. The appellant shall file with the District Court two printed copies of the record on appeal simultaneously with or prior to the filing of the printed record on appeal in the United States Circuit Court of Appeals, in place of the typewritten copies which are mentioned in Rule 75 of the Federal Rules of Civil Procedure.

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Dated: New York, N. Y., February 28, 1944.

NEWGASS & NAYFACK,
Attorneys for Plaintiffs.

MILBANK, TWEED & HOPE AND
JOHN A. KELLY,
Attorneys for Defendant.

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Stipulation as to Record.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

IT IS HEREBY STIPULATED AND AGREED, by and between the attorneys for the respective parties hereto, that the foregoing is a true and correct transcript of the proceedings in the District Court in the above entitled action, as agreed on by the parties.

377 Dated, New York, N. Y., March , 1944.

NEWGASS & NAYFACK,
Attorneys for Plaintiffs-Appellants.

MILBANK, TWEED & HOPE AND JOHN A. KELLY,
Attorneys for Defendant-Appellee.

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Clerk's Certificate.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

I, GEORGE J. H. FOLLMER, Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is the correct printed transcript of record of the said District Court in the above-entitled cause, as agreed on by the parties.

380

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed at the City of New York in the Southern District of New York on the day of in the year of our Lord one thousand nine hundred and forty-four, and the independence of the United States the one hundred and sixty-eighth.

GEORGE J. H. FOLLMER,
Clerk.

(Seal)

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[fol. 128] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1943

No. 398

(Argued June 9, 1944. Decided July 28, 1944)

JOSEPH BORELLA, et al., Appellants,

v.

THE BORDEN COMPANY, Appellee

Before L. Hand, Swan and Clark, Circuit Judges

Appeal from a judgment of the District Court for the Southern District of New York, dismissing the complaint in an action by employees of the defendant to recover for overtime compensation alleged to be due under §7(a) of the Fair Labor Standards Act.

A. H. Frisch, for the appellants.
John A. Kelly, for the appellee.

[fol. 129] L. HAND, Circuit Judge:

This appeal if from a judgment, dismissing the complaint in an action brought by employees of the defendant to recover for overtime denied them, which they assert to have been due under §7(a) of the Fair Labor Standards Act (§207(a), Title 29, U. S. Code). The facts, which are not in dispute, are sufficiently stated in the findings of the trial judge. The upshot of them is as follows. The defendant is a New Jersey corporation engaged in the milk business, which includes "processing, manufacturing, selling and distributing" milk as such, and making condensed and evaporated milk, "casein, ice cream, butter, cheese and various other products." It has an enormous business, and sends its products throughout the United States, and to foreign countries. The manufacturing all takes place in factories in the United States and Canada, which it owns and operates; but its executive and administrative activities—the supervision, management and control of the entire business—are all centered in an office building in New York, which it owns, and of which it occupies fifty-eight per cent of the total rentable area. It is not necessary to state in

detail the various activities which take place in this building; it is enough to say that here the directors meet; here the president, vice-president, treasurer, assistant treasurer, secretary, assistant secretary, and other corporate officers are housed; here is carried all its accounting; here are its cashier and his assistants; here much of the advertising is devised (though none of it is printed); here its labels are designed; here some of its photostating takes place. This is the spot from which all directions go out as to what shall be bought, what shall be manufactured, where the products shall be distributed, etc. However, no milk is processed here, nor sold from here; nor any casein, butter, cheese or other products. That part of the building which the de- [fol. 130] fendant does not occupy, it leases to others who do not "produce, manufacture, handle, process or in any other manner work on any goods."

The plaintiffs are the service and maintenance employees for the whole of this building: (1.) porters, who keep the corridors, stairways and lavatories of the building clean, who move the furniture, pack the waste paper, distribute the towels, etc.; (2.) elevator operators; (3.) night watchmen, who protect the building by making their rounds and punching their clocks. Although the plaintiffs somewhat faintly assert that they are "engaged in interstate commerce," that is plainly a subsidiary point, their main reliance being that they are "engaged in the production of goods for commerce," within the meaning of §7(a) of the Act.

Since the decision of the Supreme Court in *McLeod* v. *Threlkeld*, 319 U. S. 491, the plaintiffs do well to rely upon the second point, for it is clear that they are not "engaged in commerce." The New York Court of Appeals had already so ruled in an analogous situation (*Stoike* v. *First National Bank*, 290 N. Y. 195), and the Seventh Circuit did the same later. (*Lofther* v. *First National Bank*, 138 Fed. (2) 299.) We may therefore confine our discussion to whether they are "engaged * * * in the production of goods for commerce." It has been several times held, when all the activities of manufacture and sale take place in one building: i. e., the actual handling of the materials and of the finished products, and the administrative direction of the business, that employees in the plaintiffs' position are within the statute. *Fleming* v. *Atlantic Co.*, 40

Fed. Sup. 654, aff'd (though without discussion of the point) 131 Fed. (2) 518 (C. C. A. 5); *Fleming* v. *Swift & Co.*, 41 Fed. Sup. 825, 830 (D. C. Ill.) aff'd (though without discussion of this point) 131 Fed. (2) 249 (C. C. A. 7); *Holland* v. *Amoskeag Machinery Co.*, 44 Fed. Supp. 884 (D. C. N. H.). But such decisions are inconclusive, because after *A. B. Kirschbaum Co.* v. *Walling*, Administrator, [fol. 131] 316 U. S. 517, it would be enough if the quarters occupied by those actually in contact with the materials or the finished goods, were greater in area than those occupied by the administrative officials, as they generally are. It is only when the two groups are separated into different buildings, each cared for by a separate body of employees, that the question before us is tested; although, when that is the situation, it will obviously make no difference whether the separate building is on the same plot as the factory, or across the street, or, as here, in a different city.

The case may, therefore, be further narrowed to whether the administrative agents and employees of a producing company are themselves "engaged * * * in the production of goods for commerce," Since these are words of colloquial speech, having "fringes" of connotation, and unlike the terminology of science, deliberately fabricated for its definite outlines, it is to be expected that interpretation will vary. Nor do we necessarily arrive at the right meaning by a process of step by step examples; as though we should say that, if those who handle the milk are "engaged in production," so must be the foremen who direct them and occasionally lend a hand; and if the foremen, so must be the division superintendents, and so on. While that approach is not illegitimate it can easily lead one astray, for the reason we have just given: that legislators, like others concerned with ordinary affairs, do not deal in rigid symbols, so far as possible stripped of suggestion, and do not expect their words to be made the starting point for a dialectical progression. We can best reach the meaning here, as always, by recourse to the underlying purpose, and, with that as a guide, by trying to project upon the specific occasion how we think persons, actuated by such a purpose, would have dealt with it, if it had been presented to them at the time. To say that that is a hazardous process [fol. 132] is indeed a truism, but we cannot escape it, once we abandon literal interpretation—a method far more un-

reliable. In the case at bar we start with the datum that employees like the plaintiffs are "engaged in production" when they care for the quarters of those who manufacture the goods, or handle them. *A. B. Kirschbaum Co.* v. *Walling*, Administrator, *supra* (316 U. S. 517). That is because those who make or handle them are so engaged, and because the caretakers' work is "necessary" to their activities (§203(j), Title 29, U. S. Code). We are to ask ourselves whether the purpose which included caretakers in that situation, included caretakers in this. Indeed, in one respect the plaintiffs are nearer to "production" than were the employees in *A. B. Kirschbaum Co.* v. *Walling*, Administrator, *supra* (316 U. S. 517); for they were employed directly by the manufacturer, instead of by the manufacturer's lessor. On the other hand they are further from "production," if production must be confined to actual contact with the raw material, or the finished goods. The Tenth Circuit thought that that further remove was enough to take them outside the statute. *Rucker* v. *First National Bank of Miami, Okl.*, 138 Fed. (2) 699, 702 (2nd Col.). But it seems to us that the circumstance that administrative officials do not come in physical contact with the goods at any stage of their production, could not have been thought relevant to the object to be attained. We can conjure up no reason that could have induced Congress, having included employees who made tenantable the quarters of artisans and shipping clerks, to exclude those who made tenantable the quarters of the president, the managers, the cashiers, superintendents and the rest.

We do not indeed mean that here, or in any other interpretation of language, the words used are not far and away the most reliable source for learning the purpose of a document; the motion that the "policy of a statute" does not inhere as much in its limitations as in its affirmations, is un- [fol. 133] tenable. But we are not faced with that difficulty, for there are no words of limitation. The definition of "produced" in §3(j) concludes with the clause: "process or occupation necessary to the production thereof." True, the Supreme Court in *A. B. Kirschbaum Co.* v. *Walling*, Administrator, *supra*, 525 (316 U. S. 517) cautioned us against pressing too literally the word "necessary," but that caution need not disturb us here. Those who direct the whole conduct of an industry—both manufacture and dis-

tribution—are "necessary" to "production," if anyone is "necessary." As was observed over a century ago, every process of manufacture (indeed for that matter every process by which men can affect the outside world at all) may be resolved into the movement of things in space, and it would be absurd to say that, although what the artisans do in the factory, or the dispatching clerks do upon the shipping platforms, is "necessary" to "production," the directions they receive that govern all the movements they impart, are not "necessary." We can therefore see nothing in the language used which should limit the general purpose that, as we have tried to show, comprehends the plaintiffs; and it appears to us that any hesitation to give that purpose its full scope must proceed from a vague compunction that to press the statute so far, is unduly to invade fields which Congress must have meant to leave to local regulation. We do not share that compunction. It is of course true that the whole statute invades fields which were formerly left to local regulation. That Congress did not mean to exercise its power to the full is not important; rather the question is whether we shall say that the borders of those fields which it did choose to occupy, are to be found by considering its object, or whether the realization of that object shall be truncated by irrelevant considerations.

Judgment reversed; judgment directed for the plaintiffs.

[fol. 134] SWAN, Circuit Judge (dissenting):

I think the judgment should be affirmed. Section 3 of the Act, 29 USCA §203(j), provides that "for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof." In my opinion the porters, elevator operators, and night watchmen of the defendant's office building are too remotely related to "the production" of goods for commerce to be within the coverage of the Act. *Rucker* v. *First Nat. Bank of Miami, Okl.*, 138 F. 2d 699, 702 (C. C. A. 10).

[fol. 135] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 18th day of August one thousand nine hundred and forty-four.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Charles E. Clark, Circuit Judges.

JOSEPH BORELLA, et al., Plaintiffs-Appellants,

v.

THE BORDEN COMPANY, Defendant-Appellee

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed with costs; judgment directed for the plaintiffs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk.

[fol. 136] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Joseph Borella, et al., v. The Borden Company. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Aug. 18, 1944. A. M. Bell, Clerk.

[fol. 137] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 138] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 2, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 688

THE BORDEN COMPANY,

against - *Petitioner,*

JOSEPH BORELLA, CHARLES J. BURKE, WALTER CROSS, WILLIAM L. DeGRAAF, JOHN B. DONEGAN, STANLEY GAJDA, EDWARD GRAMCKO, STANLEY GRZECK, OLE HOFSETH, WILLIAM KAY, ALEXANDER KRUPICA, WILLIAM LENDO, THOMAS LO SASSO, ROBERT A. MARSHALL, WALTER C. MENYHART, JAMES McCARTHY, MICHAEL NOVEMBER, LEONARD B. QUINN, ANDREW RUEB, THOMAS M. TREACY AND JESUS ECHEVARRIA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND SUPPORTING BRIEF

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 688

THE BORDEN COMPANY,

Petitioner,

against

JOSEPH BORELLA, CHARLES J. BURKE, WALTER CROSS, WILLIAM L. DEGRAAF, JOHN B. DONEGAN, STANLEY GAJDA, EDWARD GRAMCKO, STANLEY GRZECK, OLE HOFSETH, WILLIAM KAY, ALEXANDER KRUPICA, WILLIAM LENDO, THOMAS LO SASSO, ROBERT A. MARSHALL, WALTER C. MENYHART, JAMES McCARTHY, MICHAEL NOVEMBER, LEONARD B. QUINN, ANDREW RUEB, THOMAS M. TREACY AND JESUS ECHEVARRIA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, The Borden Company, respectfully shows:

Summary Statement of the Matter Involved

The Circuit Court of Appeals for the Second Circuit ruled, by a divided court, that building service and main-

tenance employees, namely, porters, watchmen and elevator operators, employed by petitioner, The Borden Company, in its office building at 350 Madison Avenue, in the City of New York, are engaged in the production of goods for commerce within the meaning of Section 7 (a) of the Fair Labor Standards Act of 1938 (Section 7, 52 Stat. 1060, June 25, 1938, 29 U. S. C., Section 207 (a)) and, therefore, entitled to overtime compensation under such Act (R. 128-132).

The ruling was made in reversing a judgment of the United States District Court for the Southern District of New York, which judgment was in favor of the petitioner and against the respondents on the issues in the action on the merits (R. 121-122). The theory of said ruling was that, though respondents had no relationship or tie with actual production of goods, they were engaged in production because their work was "necessary" to the executives, accountants and other employees of The Borden Company whose office work in turn was necessary for the production of The Borden Company's products in distant places.

Such judgment of the District Court was rendered in an action brought by the respondents who claimed in their complaint that they were engaged in commerce and the production of goods for commerce and entitled to recover overtime compensation and reasonable counsel fees under the Fair Labor Standards Act of 1938 (R. 3-6). The petitioner interposed an answer in which it denied that the respondents were engaged in commerce or the production of goods for commerce, and asserted that no manufacturing was done in the building owned by petitioner in which respondents were employed, that no goods were produced for commerce in such building and that the respondents were not covered by the Fair Labor Standards Act of 1938 (R. 7-11).

The Circuit Court of Appeals' order for mandate (R. 135) and its mandate were both made August 18, 1944.

The majority opinion (R. 128-132), written by Circuit Judge Learned Hand and concurred in by Circuit Judge Charles E. Clark, and the dissenting opinion (R. 132) of Circuit Judge Thomas W. Swan are not yet reported. The opinion of District Judge Edward A. Conger (R. 102-106) before whom the case was tried without a jury is reported (52 F. Supp. 952).

Petitioner, a New Jersey corporation, owns a twenty-four story office building at No. 350 Madison Avenue, in the City, County and State of New York (R. 117, 128), in which it maintains its home office, and it occupies in whole or in part approximately seventeen of the twenty-four floors and 58% of the total rentable area (R. 118, 128).

The remainder of the building is occupied by various tenants who do not produce, manufacture, handle, process or in any other manner work on any goods in said building (R. 119, 120, 129).

While petitioner's business is that of processing, manufacturing, selling and distributing fluid, condensed and evaporated milk, casein, ice cream, butter, cheese and various other products (R. 117, 128) such activities are not carried on in its office building involved in this case. In other words, to use the language of the Statute, petitioner does not produce, manufacture, handle, process, or in any other manner work on any goods in said office building (R. 119, 129). Such activities are carried on in various plants and factories of the petitioner throughout the United States and Canada (R. 117, 128).

The President, executive vice-president, vice presidents, treasurer and assistant treasurers, secretary and assistant secretaries, and other officers and subordinate employees of the petitioner are housed in said building, and the Board

of Directors of the petitioner holds its regular and special meetings therein (R. 118, 129-130).

The petitioner directs, supervises, manages and controls its entire business through the aforesaid directors, officers and employees (R. 118, 128).

In this building much of the advertising is devised, though none of it is printed there (R. 118, 129). Labels for petitioner's products are designed in this building and some of the photostating takes place there (R. 119, 129).

The respondents are building maintenance employees, namely, porters, elevator operators and watchmen, who are employed in the operation and maintenance of petitioner's office building (R. 118, 129).

The Circuit Court of Appeals accepted and adopted the facts as found by the Trial Judge (R. 117-120, 128, 129).

While the respondents claimed that they were engaged in commerce and also in the production of goods for commerce within the meaning of the Fair Labor Standards Act of 1938, (R. 5) the Circuit Court of Appeals held that they were not engaged in commerce (R. 129) but were engaged in the production of goods for commerce (R. 129-132).

Application has not been made for reargument, reconsideration or rehearing in respect of the decision of the Circuit Court of Appeals for the Second Circuit.

Petitioner presents to this Court, and files herewith as an exhibit hereto, a duly certified transcript of the entire record in the case, as the same appears in the United States Circuit Court of Appeals for the Second Circuit.

Jurisdictional Statement

Jurisdiction to review this case upon writ of certiorari is expressly conferred upon this Court by Judicial Code, Section 240, as amended (Act of March 3, 1891, c. 517,

Sec. 6, 26 Stat. 828; Act of March 3, 1911, c. 231, Sec. 240, 36 Stat. 1157; Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938; U. S. C. Title 28, Sec. 347).

Question Presented

The question presented is whether the respondents were engaged in—whether their office building maintenance activities were "necessary" to—production of goods for commerce within the meaning of the Fair Labor Standards Act of 1938 (52 Stat. 1060, June 25, 1938, 29 U. S. C., Sec. 201-219).

Reasons Relied on For Granting the Writ

This Court is requested to grant the writ for the following reasons:

1. The decision of the Circuit Court of Appeals is in conflict with the decision of the Circuit Court of Appeals for the Tenth Circuit in the case of *Rucker* v. *First Nat. Bank of Miami, Okl.*, 138 F. (2d) 699, C. C. A. 10, certiorari denied 321 U. S. 769; and is in conflict with the reasoning of the decisions in the cases of *Kirschbaum Co.* v. *Walling*, 316 U. S. 517; *Walton* v. *Southern Package Corp.*, 320 U. S. 540; *Lofther* v. *First Nat. Bank of Chicago*, 48 F. Supp. 692, aff'd 138 F. (2d) 299, C. C. A. 7; *Stoike* v. *First Nat. Bank of City of New York*, 290 N. Y. 195, certiorari denied 320 U. S. 762; *Johnson* v. *Masonic Bldg. Co.*, 138 F. (2d) 817, C. C. A. 5, certiorari denied 321 U. S. 780; *Johnson* v. *Dallas Downtown Development Co.*, 132 F. (2d) 287, C. C. A. 5, certiorari denied 318 U. S. 790; *Convey* v. *Omaha Nat. Bank*, 140 F. (2d) 640, C. C. A. 8, certiorari denied 321 U. S. 78; *Tate* v. *Empire Building Corporation*, U. S. District Court, Eastern District of Tennessee, 2 WH cases, 472, not officially reported, aff'd 135 F. (2d) 743, C. C. A. 6, certiorari denied 320 U. S. 766; *Rosenberg* v. *Semeria*, 137 F. (2d) 742, C. C. A. 9, certiorari denied,

sub nom. Semerio et al v. *Rosenberg,* 320 U. S. 770; *Cochran* v. *Florida Nat. Bldg. Corporation,* 45 F. Supp. 830, aff'd 134 F. (2d) 615, C. C. A. 5; *Noonan* v. *Fruco Const. Co.,* 140 F. (2d) 633, C. C. A. 8; *Blumenthal* v. *Girard Trust Co.,* 141 F. (2d) 849; C. C. A. 3; *Building Service Employees International Union* v. *Trenton Trust Company,* 142 F. (2d) 257, C. C. A. 3; *Hinkler* v. *Eighty-Three Maiden Lane Corporation,* 50 F. Supp. 263; *Callus* v. *10 East Fortieth Street Building, Inc.,* 51 F. Supp. 528; *Cullen* v. *Stone & Webster,* U. S. District Court, Southern District of New York, 7 WHR 147, not officially reported; *Brandel* v. *Continental Illinois Nat. Bank & T. Co.,* 43 F. Supp. 781; *Baldwin* v. *Emigrant Industrial Savings Bank,* U. S. District Court, Southern District of New York, 7 WHR 831, not officially reported; *Wideman* v. *Blanchard & Calhoun Realty Co.,* 50 F. Supp. 626.

In all of the aforesaid cases in which certiorari has been denied, the decisions were in favor of the employer and to the effect that office building service maintenance employees were not covered by the Fair Labor Standards Act of 1938. Search of the authorities reveals no State decisions in conflict with the listed Federal cases.

2. The decision of the Circuit Court of Appeals herein involves an important question of Federal law which has not been but which should be settled by this Court. The ruling of this Court in *Kirschbaum Co.* v. *Walling,* 316 U. S. 517, dealt with building service and maintenance employees of a loft building whose tenants were engaged principally in the production of goods for commerce in the building. There are, however, thousands of office buildings where no production takes place housing tenants engaged in the production of goods wholly outside of and apart from such buildings. The owners of such office buildings are vitally interested in the question of whether

or not their building service and maintenance employees are engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act. If they are, such owners are faced with liability retroactive to October 24, 1938 in hundreds of millions of dollars, despite their reliance upon earlier rulings as to the scope of the commerce power and later the ruling of this Court in the *Kirschbaum* case and the numerous cases decided in favor of building owners in which cases this Court denied certiorari. This Court has not yet ruled on the question of liability of such owners.

Prayer for Writ

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court to the United States Circuit Court of Appeals for the Second Circuit commanding said last named Court to certify and send to this Honorable Court a full and complete transcript of the record of all proceedings in the within cause and to stand to and abide by such order and direction as to your Honors shall seem meet and the circumstances of the case require and that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem proper.

Dated: New York, N. Y., November 9, 1944.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 688

THE BORDEN COMPANY,

Petitioner,

against

JOSEPH BORELLA, CHARLES J. BURKE, WALTER CROSS, WILLIAM L. DeGRAAF, JOHN B. DONEGAN, STANLEY GAJDA, EDWARD GRAMCKO, STANLEY GRZECK, OLE HOFSETH, WILLIAM KAY, ALEXANDER KRUPICA, WILLIAM LENDO, THOMAS LO SASSO, ROBERT A. MARSHALL, WALTER C. MENYHART, JAMES McCARTHY, MICHAEL NOVEMBER, LEONARD B. QUINN, ANDREW RUEB, THOMAS M. TREACY AND JESUS ECHEVARRIA,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions of Courts Below

The opinion of the District Court (R. 102-106) is reported in 52 F. Supp. 952.

The majority and dissenting opinions of the Circuit Court of Appeals, Second Circuit (R. 128-132) are not yet reported.

Jurisdiction

Jurisdiction to review this case upon writ of certiorari is expressly conferred upon this Court by Judicial Code, Sec-

tion 240, as amended (Act of March 3, 1891, c. 517, Sec. 6, 26 Stat. 828; Act of March 3, 1911, c. 231, Sec. 240, 36 Stat. 1157; Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938; U. S. C., Title 28, Sec. 347).

The Circuit Cuort of Appeals' order for mandate (R. 133) and its mandate were both made August 18, 1944.

Application has not been made for reargument, reconsideration or rehearing in respect of the decision of the Circuit Court of Appeals for the Second Circuit.

Statement of Case

A sufficient statement of the case will be found in the accompanying petition and in the interest of brevity will not be repeated.

Specification of Errors

The Circuit Court of Appeals for the Second Circuit erred in holding that the respondents were engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act of 1938.

Relevant Provisions of Statutes Involved

Fair Labor Standards Act of 1938—(Act of June 25, 1938, c. 676, 52 Stat. 1060, 29 U. S. C., Sec. 201-219).

"Sec. 3. As used in this Act—

* * * * * * *

"(b) 'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof." (29 U. S. C. § 203(b))

"(j) 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the

production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State." (29 U. S. C. § 203(j))

"Sec. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

"(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

"(2) for a workweek longer than forty-two hours during the second year from such date, or

"(3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." (29 U. S. C. §207(a))

ARGUMENT

POINT I

The Circuit Court of Appeals for the Second Circuit Has Rendered a Decision in the Case at Bar Avowedly in Conflict with the Decision of the Circuit Court of Appeals for the Tenth Circuit on the Same Matter in the Case of Rucker v. First Nat. Bank of Miami, Okl., 138 F. (2d) 699, Certiorari Denied, 321 U. S. 769.

In the case of *Rucker* v. *First Nat. Bank of Miami, Okl.*, 138 F. (2d) 699, C. C. A. 10, certiorari denied, 321 U. S. 769, the plaintiffs who were elevator operators in a six-story office building, owned and operated by the defendant, instituted an action to recover overtime com-

pensation and liquidated damages claimed to be due them under the provisions of the Fair Labor Standards Act of 1938. The first floor of this building was used by the defendant to carry on a national banking business. The remaining floors were leased to various tenants. Some of these tenants, apparently occupying a considerable part of the building's rentable area, were companies elsewhere engaged in the production of goods for commerce which used the space leased by them solely for the purpose of housing their executive and administrative offices; the other tenants were engaged in interstate and intrastate commerce; none of the tenants, however, were shown to have been engaged in the production of goods in the building. The plaintiffs conveyed the tenents and the public to and from the upper floors in the building.

The Circuit Court of Appeals, Tenth Circuit, held that the plaintiffs were not engaged in commerce or in the production of goods for commerce within the meaning of the Fair Labor Standards Act of 1938 and affirmed a judgment of the United States District Court dismissing the plaintiffs' complaint.

In that case the Circuit Court of Appeals, Tenth Circuit, found that the building there was occupied by the executive offices of tenants elsewhere engaged in the production of goods for commerce. Referring to this type of occupancy, the court said:

> "Specifically, we are urged to hold that these employees, as evevator operators, were engaged in the production of goods for commerce on the authority of Kirschbaum Co. *v.* Walling, supra. In that case the court held that elevator operators and other building employees were engaged in the production of goods for commerce, because the services which they performed were so closely and intimately associated with the actual production of goods for commerce as to be in reality a part of the process. There, concededly, the tenants occupying the building were actually engaged in the

production of goods for interstate commerce, and the elevator operators in the building ran both the freight elevators which started and finished the interstate journeys of goods going from and coming to the tenants, and the passenger elevators which carried employees, customers, salesmen and vistors. In holding that elevator operators, under these facts, were engaged in the production of goods for commerce, the court said [316 U. S. 517, 62 S. Ct. 1121, 86 L. Ed. 1638]: 'in our judgment, the work of the employees in these cases had such a close and immediate tie with the process of production for commerce, and was therefore so much an essential part of it, that the employees are to be regarded as engaged in an occupation "necessary to the production of goods for commerce."' But, the court significantly observed that the criterion was necessarily one of degree and must be so considered in defining coverage under the phrase 'production of goods for commerce.' See, also, Warren-Bradshaw *v.* Hall, supra; Walling *v.* Patton-Tulley Transp. Co., 6 Cir., 134 F. 2d 945; Hanson *v.* Lagerstrom, 8 Cir., 133 F. 2d 120, and Consolidated Timber Co. *v.* Womack, 9 Cir., 132 F. 2d 101.

"But the facts before us which bear upon the phrase 'production of goods for commerce' are only remotely analogous to the facts in the Kirschbaum case. The executive and administrative offices of the mining and smelting company were located in the building serviced by the elevator operators, and this company was doubtless engaged in the production of goods for commerce, but it is not shown on this record whether any of the goods were produced in the building, or that any of the employees transported to and from the offices are directly or indirectly engaged in the production of the goods. The same is true of the chat and crushed rock company, and the abstract company, which produced abstracts, some of which were shipped in interstate commerce. In any event, the relationship is not shown to be 'close and immediate.' Under these facts it cannot be said that the activities of the elevator

operators were an essential part of, or necessary to, the production of goods for commerce." (pp. 701, 702).

The petitioner in the case at bar is not engaged in the production of goods in its office building (R. 119, 129) but it is so engaged elsewhere (R. 117, 128); the other tenants are not engaged in the production of goods in the building (R. 119, 120, 129). In the case at bar and in the case of *Rucker* v. *First Nat. Bank of Miami, Okl.*, 138 F (2d) 699, C. C. A. 10 certiorari denied 321 U. S. 769, it was not shown that there was any production of goods for commerce in the respective buildings involved although there was production of goods elsewhere, yet the Circuit Court of Appeals for the Second Circuit and the Circuit Court of Appeals for the Tenth Circuit arrived at directly opposite conclusions and the decisions are in conflict.

The majority opinion of the Circuit Court of Appeals, Second Circuit recognized the existence of this conflict in the following part of its opinion:

> "In the case at bar we start with the datum that employees like the plaintiffs are 'engaged in production' when they care for the quarters of those who manufacture the goods, or handle them. *A. B. Kirschbaum Co.* v. *Walling*, Administrator, supra (316 U. S. 517). That is because those who make or handle them are so engaged, and because the caretakers' work is 'necessary' to their activities (§203 (j), Title 29 U. S. Code). We are to ask ourselves whether the purpose which included caretakers in that situation, included caretakers in this. Indeed, in one respect the plaintiffs are nearer to 'production' than were the employees in *A. B. Kirschbaum Co.* v. *Walling*, Administrator, *supra* (316 U. S. 517); for they were employed directly by the manufacturer, instead of by the manufacturer's lessor. On the other hand, they are further from 'production', if production must be confined to actual contact with the raw material, or the finished goods. *The Tenth Circuit thought that that further removed*

was enough to take them outside the statute. Rucker v. *First National Bank of Miami, Okl.*, 138 F. (2d) 699, 702 (2nd Col.)." (Italics ours)

The Circuit Court of Appeals, Second Circuit, on the other hand, thought that such further removal of the respondents from the production of goods for commerce was not enough to place them outside the statute. It is obvious, therefore, that these decisions are in conflict.

The dissenting opinion in the case at bar, however, followed the ruling in the case of *Rucker* v. *First Nat. Bank of Miami, Okl.*, 138 F. (2d) 699, C. C. A. 10, certiorari denied 321 U. S. 769. Judge Swan said:

> "I think the judgment should be affirmed. Section 3 of the Act, 29 U. S. C. A. § 203 (j), provides that 'for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof.' In my opinion the porters, elevator operators, and night watchmen of the defendant's office building are too remotely related to 'the production' of goods for commerce to be within the coverage of the Act. Rucker v. First Nat. Bank. of Miami, Okl., 138 F. 2d 699, 702 (C. C. A. 10)."

Point II

The Decision of the Circuit Court of Appeals for the Second Circuit in the Case at Bar is in Conflict with the Reasoning of the Court in the Case of Kirschbaum Co. v. Walling, 316 U. S. 517, and with the Reasoning of Decisions of Various Circuit Courts of Appeal and of United States District Courts.

This court has observed a well-defined line of reasoning in cases involving the determination of the question whether

a given employee comes within the purview of the Fair Labor Standards Act of 1938. This line of reasoning is exemplified in the case of *Kirschbaum Co.* v. *Walling*, 316 U. S. 517. In the *Kirschbaum* case this Court in its opinion, among other things, said:

> "Since the scope of the Act is not coextensive with the limits of the power of Congress over commerce, the question remains whether these employees fall within the statutory definition of employees 'engaged in commerce or in the production of goods for commerce,' construed as the provision must be in the context of the history of federal absorption of governmental authority over industrial enterprise. In this task of construction, we are without the aid afforded by a preliminary administrative process for determining whether the particular situation is within the regulated area. Unlike the Interstate Commerce Act and the National Labor Relations Act and other legislation, the Fair Labor Standards Act puts upon the courts the independent responsibility of applying *ad hoc* the general terms of the statute to an infinite variety of complicated industrial situations. Our problem is, of course, one of drawing lines. But it is not at all a problem in mensuration. There are no fixed points, though lines are to be drawn. The real question is how the lines are to be drawn—what are the relevant considerations in placing the line here rather than there. To that end we have tried to state with candor the larger considerations of national policy, legislative history, and administrative practicalities that underlie the variations in the terms of Congressional commercial regulatory measures and which therefore should govern their judicial construction." (p. 523)

In the same case this Court further said:

"We cannot, in construing the work 'necessary,' escape an inquiry into the relationship of the particular employees to the production of goods for commerce. If the work of the employees has only the most tenuous

relation to, and is not in any fitting sense 'necessary' to, the production, it is immaterial that their activities would be substantially the same if the employees worked directly for the producers of goods for commerce.

"We agree, however, with the conclusion of the courts below. In our judgment, the work of the employees in these cases had such a close and immediate tie with the process of production for commerce, and was therefore so much an essential part of it, that the employees are to be regarded as engaged in an occupation 'necessary to the production of goods for commerce.'" (pp. 525, 526)

In other words, this Court having in mind the larger considerations of national policy, legislative history and administrative practicalities held that the building service employees in that case who worked in a building in which goods were produced for interstate commerce were themselves engaged in the production of these goods for the reason that their activities sustained such a close relation thereto as to be in reality a part thereof.

In the case at bar the Circuit Court of Appeals, Second Circuit, did not follow the reasoning in the case of *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, and failed to make a specific determination that the work of the respondents did or did not have a direct and immediate tie with the production of goods for commerce. If it had pursued this line of reasoning, it is respectfully submitted that the work of the respondents would have been found to have merely a tenuous, remote and insubstantial relation to the production of goods for commerce and that there was not such a close and immediate tie as to bring the respondents within the coverage of the Act.

In disregarding the reasoning of this Court and in arriving at its decision, the Circuit Court of Appeals, Second Circuit, ignored the admonition contained in the following

excerpt from the opinion of this Court in the case of *Gully* v. *First Nat. Bank in Meridian*, 299 U. S. 109, which was quoted with approval by this Court in the case of *Kirschbaum Co.* v. *Walling*, 316 U. S. 517:

> "What is needed is something of that common-sense accommodation of judgment to kaleidoscopic situations which charaterizes the law in its treatment of problems of causation. One could carry the search for causes backward, almost without end." (p. 117)

This Court in defining "necessary" as used in the Statute, has used the terms "close and immediate tie with", "essential part of", "not tenuous" (*Kirschbaum Co.* v. *Walling, Supra*) "intimately related", "connection • • • quite substantial" (*Warren-Bradshaw Co.* v. *Hall*, 317 U. S. 88, 91).

By these definitions, those who are necessary to others who, in turn, are necessary to still others who are engaged in actual production are not themselves engaged in production. Those who are twice removed from production would not have a "close and immediate tie with" production.

If these definitions were not applied, there would be no end to the chain of producers. If elevator operators are producers of goods because they are necessary to stenographers and accountants who are necessary to manufacturing activities in another state, then the bus drivers who bring the elevator man to work, the tailor who cleans the bus driver's uniform and the gasoline station attendant who fills the bus' tank are likewise in a "remote" sense "necessary" to production in distant places.

If these definitions are discarded, then certainly a railroad which transports goods would be necessary to production and thus engaged in the production of goods for commerce. Maintenance-of-way men necessary to railroading would likewise be engaged in production and the

cook who feeds them being necessary to the maintenance of way workers would also be necessary for production and so engaged in production.

But in *McLeod* v. *Threlkeld*, 319 U. S. 491, this Court said, at page 493:

> "McLeod was not engaged in the production of goods for commerce. His duties as cook and caretaker for maintenance-of-way men on a railroad lie completely outside that clause."

Other Federal Courts have followed the line of reasoning of *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, in determining this same question. In so doing they have invariably held that building service employees in office buildings are not covered by the Act. (See *Bucker* v. *First Nat. Bank of Miami, Okl.*, 138 F. (2d) 699, C. C. A. 10, certiorari denied 321 U. S. 769; *Lofther* v. *First Nat. Bank of Chicago*, 48 F. Supp. 692, aff'd 138 F. (2d) 299, C. C. A. 7; *Stoike* v. *First Nat. Bank of City of New York*; 290 N. Y. 195, certiorari denied 320 U. S. 762; *Johnson* v. *Masonic Bldg. Co.*, 138 F. (2d) 817, C. C. A. 5, certiorari denied, 321 U. S. 780; *Johnson* v. *Dallas Downtown Development Co.*, 132 F. (2d) 287, C. C. A. 5, certiorari denied, 318 U. S. 790; *Convey* v. *Omaha Nat. Bank*, 40 F. (2d) 640, C. C. A. 8, certiorari denied, 321 U. S. 78; *Tate* v. *Empire Building Corporation*, U. S. District Court, Eastern District of Tennessee, 2 WH cases, 472, not officially reported, aff'd 135 F. (2d) 743, C. C. A. 6, certiorari denied 320 U. S. 766; *Rosenberg* v. *Semeria*, 137 F. (2d) 742, C. C. A. 9, certiorari denied, *sub nom Semerio et al* v. *Rosenberg*, 320 U. S. 770; *Cochran* v. *Florida Nat. Bldg. Corporation*, 45 F. Supp. 830, aff'd 134 F. (2d) 613, C. C. A. 5; *Blumenthal* v. *Girard Trust Co.*, 141 F. (2d) 849, C. C. A. 3; *Building Service Employees International Union* v. *Trenton Trust Company*, 142, F. (2d) 257, C. C. A. 3; *Hinkler* v. *Eighty-Three Maiden Lane Corporation*, 50 F. Supp. 263; *Callus*

v. *10 East Fortieth Street Building, Inc.*, 51 F. Supp. 528; *Cullen* v. *Stone & Webster*, U. S. District Court, Southern District of New York, 7 WHR 147, not officially reported; *Brandel* v. *Continental Illinois Nat. Bank & T. Co.*, 43 Supp. 781; *Baldwin* v. *Emigrant Industrial Savings Bank*, U. S. District Court, Southern District of New York, 7 WHR 831, not officially reported; *Wideman* v. *Blanchard & Calhoun Realty Co.*, 50 F. Supp. 626. No distinction is made in these cases between the service employees in one office building and those in another, based upon the varying or diversified activities in which the tenants in these office buildings are engaged. Whether the tenants are, among others, the executive and administrative personnel of companies elsewhere engaged in the production of goods for interstate commerce or whether the tenants are engaged in interstate commerce in the building, albeit not engaged there or elsewhere in the production of goods for commerce, all service employees employed in buildings occupied by such tenants have been uniformly adjudged outside the scope of the Act.

The conviction generally prevailed that these decisions settled the law on this subject and that the reasoning of the Courts in these cases would be followed in all similar ones. This conviction was considerably strengthened by the fact that in every case in which building service employees were unsuccessful in the lower courts and applied to the Court for writs of certiorari, their applications to this Court for such writs were denied. (See *Rucker* v. *First Nat. Bank of Miami, Okl.*, 138 F. (2d) 699, C. C. A. 10, certiorari denied, 321 U. S. 769; *Stoike* v. *First Nat. Bank of City of New York*, 290 N. Y. 195, certiorari denied, 320 U. S. 762; *Johnson* v. *Masonic Bldg. Co.*, 138 F. (2d) 617, C. C. A. 5, certiorari denied, 321 U. S. 780; *Johnson* v. *Dallas Downtown Development Co.*, 132 F. (2d) 287 C. C. A. 5, certiorari denied, 318 U. S. 790; *Convey* v. *Omaha*

Nat. Bank, 140 F. (2d) 640, C. C. A. 8, certiorari denied, 321 U. S. 78; *Tate* v. *Empire Building Corporation*, U. S. District Court, Eastern District of Tennessee, 2 WH cases, 472, not officially reported, aff'd 135 F. (2d) 743, C. C. A. 6, certiorari denied, 320 U. S. 766; *Rosenberg* v. *Semeria*, 137 F. (2d) 742, C. C. A. 9, certiorari denied, *sub nom Semerio et al.* v. *Rosenberg*, 320 U. S. 770.)

The Circuit Court of Appeals, Second Circuit, however, in deciding the case at bar chose a line of reasoning which, besides being novel and suggestive of legislative rather than judicial functioning, is in conflict with the reasoning in the cases cited above. This conflicting line of reasoning is clearly reflected in the following part of the court's opinion where it interpreted the scope of the language, "engaged * * * in the production of goods for commerce" as used in the Fair Labor Standards Act, for the purpose of ascertaining whether it is broad enough to embrace the respondents:

> "We can best reach the meaning here, as always, by recourse to the underlying purpose, and, with that as a guide, by trying to project upon the specific occasion how we think persons, actuated by such a purpose, would have dealt with it, if it had been presented to them at the time. To say that that is a hazardous process is indeed a truism, but we cannot escape it, once we abandon literal interpretation—a method for more unreliable. * * * We can conjure up no reason that could have induced Congress, having included employees who made tenantable the quarters of artisans and shipping clerks, to exclude those who made tenantable the quarters of the president, the managers, the cashiers, superintendents and the rest."

Summarizing the reasoning of the court in the case at bar it amounts to this, that the answer to the question, whether a given employee comes within the purview of the

Fair Labor Standards Act hinges upon a consideration of the underlying purpose of the Act taken in conjunction with a presumed Congressional determination if this specific employee had been considered by it at the time. This is the first case involving building service employees in which a court has used reasoning of this kind in reaching a decision. It is respectfully submitted that this reasoning is in conflict with the reasoning in the cases hereinbefore cited.

Point III

The Circuit Court of Appeals for the Second Circuit Has Decided an Important Question of Federal Law Which Has Not Been, But Should Be, Settled By This Court.

The question of law in the case at bar is whether the respondents, circumstanced as they are, are engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act of 1938. This question has not been settled by this Court. It was not directly settled in the case of *Kirschbaum Co.* v. *Walling,* 316 U. S. 517, nor in the case of *Walton* v. *Southern Package Corp.,* 320 U. S. 540, and these are the only cases in which this Court has directly considered the question whether building service employees are within the purview of the Act.

In the cases of *Kirschbaum Co.* v. *Walling, supra,* and *Walton* v. *Southern Package Corp., supra,* this Court held that the work of building service employees therein considered who worked in a building wherein goods were physically produced for commerce had such a close and immediate tie with such production that it was part thereof and that these service employees were therefore covered by the Act. In the case at bar, on the other hand, goods were not produced for commerce in the building wherein the respondents worked but such production was carried on in Petitioner's plants and factories scattered throughout the

United States and Canada and separated from the building in which the respondents worked by hundreds and thousands of miles.

All Federal courts which have passed upon the question have uniformly held that building service employees employed in office buildings are not covered by the Act (see authorities cited in Point II). The decision in the case at bar is the first in which any Federal court has ever finally held that building service employees in office buildings are covered by the Act. This holding has created much uncertainty in the law and a decision by this Court is necessary in order that this uncertainty may be dissipated and the law on the subject settled.

The question of law involved here is an important one. There are thousands of office buildings in the United States where no production takes place but whose tenants produce goods for commerce at plants located wholly outside of and apart from such buildings. A decision of the present judicial controversy therefore will not only settle the issues between the parties-litigant herein but it will also determine the rights and obligations of these building owners and building service employees throughout the United States.

The question of the liability of employers of building service and maintenance employees in such buildings has not yet been determined by this Court. The employers have proceeded on the assumption that the reasoning of the decided cases absolved them from liability but if the decision in the case at bar is not reviewed, there will be great uncertainty. The district courts which are bound by the decision of the Circuit Court of Appeals for the Second Circuit, in the absence of such review, will be required to follow the decision of that Circuit Court of Appeals whereas the district courts controlled by other Circuit Courts of Appeal will arrive at a diametrically contrary result.

Conclusion

It is respectfully submitted that the petition for a writ of certiorari in this case should be granted.

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Supreme Court of the United States

OCTOBER TERM, 1944

No. 688

THE BORDEN COMPANY,

Petitioner,

against

JOSEPH BORELLA, CHARLES J. BURKE, WALTER CROSS, WILLIAM L. DeGRAAF, JOHN B. DONEGAN, STANLEY GAJDA, EDWARD GRAMCKO, STANLEY GRZECK, OLE HOFSETH, WILLIAM KAY, ALEXANDER KRUPICA, WILLIAM LENDO, THOMAS LO SASSO, ROBERT A. MARSHALL, WALTER C. MENYHART, JAMES McCARTHY, MICHAEL NOVEMBER, LEONARD B. QUINN, ANDREW RUEB, THOMAS M. TREACY AND JESUS ECHEVARRIA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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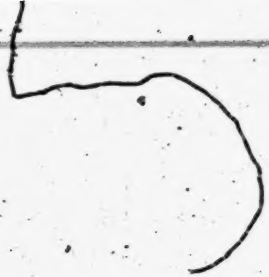

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

The Circuit Court of Appeals for the Second Circuit has just handed down a decision in the case of *Callus, et al.* vs. *10 East 40th Street Building, Inc., et ano.*, in which it has again held that service employees in an office building

come within the purview of the Fair Labor Standards Act of 1938. Citing *Borella, et al.* v. *The Borden Company*, the Circuit Court of Appeals in the *Callus* case stated that "the executive offices of the manufacturing and mining concerns are occupied by those engaged in the production of goods for commerce." The court there went further and held also that sales agencies representing mining and manufacturing concerns were likewise engaged in the production of goods for commerce because they are "engaged in 'handling' the goods by arranging their transfer from one person to another."

The Circuit Court of Appeals for the Second Circuit, realizing that it has taken a unique position in controversies involving office building service employees and apparently desirous of dispelling any misunderstanding regarding that position, concluded its opinion in the *Callus* case with the following clear, unmistakable and decisive pronouncement:

> "Decisions of other Circuits which reached a contrary view seem to have rejected the rationale to which we committed ourselves in the *Borella* case and to which we shall adhere here."

In this one sentence the Circuit Court of Appeals for the Second Circuit announced its awareness of the fact that the decisions in the *Borella* and *Callus* cases are in conflict with the decisions in other Circuits and that the reasoning which it followed in these two cases is in conflict with the reasoning adopted by other Circuit Courts of Appeals in the decision of like cases.

For the convenience of the Court we attach as an appendix to this brief the complete opinion of the Circuit Court of Appeals in the *Callus* case.

Conclusion

It is respectfully submitted that the petition for a writ of certiorari in this case should be granted.

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HENRY KIRK GREER,
Of Counsel.

Appendix

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 143—OCTOBER TERM, 1944.

(Argued November 13, 1944 Decided December 12, 1944.)

CHARLES CALLUS, SAMUEL SAID, LOUIS SAGGESE, ALFRED BREGLIA, JOSEPH BARBARA, GERALD KERR, PETER OHAN, ANGELO MICALLEF, FRANK VOSCINAR, WILLIAM DE TROY, JOHN MICHALICKA, ISADORE MIKA, JACOB VARTABEDIAN, LAURENCE ZAMMIT, JULIUS OROSZ, CHARLES BONNICI, BENJAMIN C. HARRIS, DENNIS SHEA, ALFONSO CHIVELLY, THOMAS CALLAHAN, FRANK LANGE, FRANK COLANGELO, SALVATORE FIORENZA, JOSEPH SPITERI, WALLY SPITERI, AZIZ KASSABIAN, ALBERT VOGEL, PAUL CHAMBERS, SAMUEL MITCHELL, PETER MACREDI, ELIA VESCHIONE, MICHAEL ADDEA, MICHAEL DE TROY, JOSEPH S. RAYZAK, HERBERT B. MCCLELLAND, THOMAS ROSSO, GAETANO GRECK, JOHN I. ORTIZ, GILBERT ORTIZ, PASQUALE A. SAGGESE, EDWARD KILLIAN, JAMES H. LAW, GEORGE OROSZ, SALVADOR SANCHEZ, ROBERT MURDEN, JOHN P. SMYTH, FRED KASSAB, JOSEPH CEFAI, JOSEPH HERRERA, EMIL J. CISEK and CHARLES G. BORG, suing in behalf of themselves and all other employees and former employees of defendants similarly situated,

Plaintiffs-Appellants,

—*v.*—

10 EAST 40th STREET BUILDING, INC., and CROSS & BROWN COMPANY,

Defendants-Appellees.

Before:

L. HAND, A. N. HAND and FRANK,
Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York dismissing appellants' complaint. Reversed.

AARON BENENSON (Monroe Goldwater and James L. Goldwater, of counsel) for appellants;

PROSKAUER ROSE GOETZ & MENDELSOHN (Joseph M. Proskauer, Harold H. Levin, of counsel) for appellee, 10 East 40th Street Building, Inc.

This is an action under §16(b) of the Fair Labor Standards Act (28 U. S. C. §216(b)) for the recovery by the plaintiffs, employees of defendant, of overtime wages and an equal amount in liquidated damages. The only question presented is whether the employees are covered by the Act. The plaintiffs are maintenance employees of an office building which is owned and operated by the defendant corporation. The building, during the time in question, was rented to the following groups of tenants:

(1) Executive and sales offices of twenty concerns carrying on elsewhere the business of manufacturing and mining. The offices are used for executive and administrative activities, for conferences and for taking orders for substantial quantities of merchandise of considerable value manufactured and shipped, from factories and mines elsewhere located, to customers in several states.

(2) Offices of sales agencies representing seventeen manufacturers and mining concerns carrying on elsewhere the business of manufacturing and mining. The offices in the building are used to sell a variety of the products of the companies they represent. As a result of the efforts of these agencies substantial amounts of merchandise of considerable value are shipped across state lines from factories, mines, and warehouses, elsewhere located in various parts of the country.

(3) Twenty-four lawyers and law firms carrying on the usual activities incident to the practice of law.

(4) The United States Employment Service which places white-collar workers in various factories and business houses.

(5) Advertising agents and publicity and trade organizations which carry on publicity and advertising work using national publications, newspapers and radio. One publishing firm is included in this group. Its business here consists of the purchase and receipt of scripts, the examination and correction of the same and the regular business and financial activities of the firm. The officers and employees of the trade organization are principally engaged in research and correspondence incidental to their operations. They also prepare circulars and in some cases weekly or monthly publications which are elsewhere printed and in most cases distributed from places other than the building herein.

(6) Engineering and construction firms which carry on their correspondence and executive and administrative activities from the offices in this building.

(7) Investment, financing and credit organizations which use their offices for their executive and administrative

work. The investments, financing and credit work is done in connection with businesses and projects located in various parts of the country.

(8) Offices of import and export firms which make arrangements for export and import of a variety of goods of substantial value.

(9) Miscellaneous tenants including dentists, charitable organizations, etc., whose activities are not interstate in character.

FRANK, *Circuit Judge:*

The plaintiffs' suit is based on the theory that they are "engaged in the production of goods for [interstate] commerce." They do not, and could not, contend that they are "engaged in [interstate] commerce." *McLeod* v. *Threlkeld*, 319 U. S. 491. It is already well-established that, where the tenants of a building are engaged in manufacturing, the service employees of the building come under the Fair Labor Standards Act, 29 U. S. C. sections 201 et seq. *Kirschbaum Co.* v. *Walling*, 316 U. S. 517. And we have recognized that persons who comprise management as well as those physically engaged in the manufacture of goods are so engaged in production as defined by the Act as to bring the service employees of the office building in which they are located under the coverage of the Act. *Borella* v. *Borden*, 145 F. (2d)——(C. C. A. 2). The question before us here then is whether a substantial proportion of the tenants of the office building at 10 East 40th Street are engaged in the production of goods for commerce.

1. It is clear, we think, that the investment, finance and credit organizations, the engineering and construction firms, as well as the lawyers, the United States Employment Service and the miscellaneous tenants described above are not

engaged in the production of goods for commerce. These tenants occupy about 44% of the available space and 49% of the rented part of the building.

2. It would seem equally clear that the executive offices of the manufacturing and mining concerns are occupied by those engaged in the production of goods for commerce. *Borella* v. *Borden, supra.* These tenants occupy about 26% of the rentable area of the building and about 29% of the rented space. Thus, it may not be necessary to go beyond the activities of these tenants to determine that the maintenance employees are entitled to the benefits of the Act. The Wage and Hour Division has adopted a standard of 20% for determining whether a substantial portion of the building is devoted to production for interstate commerce. Release No. PR-19 (rev.) (Nov. 19, 1943). Some quantitative standard is necessary. Interpretations of the Act by the Wage and Hour Division, especially when not taking the form of authorized regulations, are not decisive; but we have been admonished that they are "entitled to great weight." *United States* v. *American Trucking Associations*, 310 U. S. 534, 549. The Division's 20% standard seems to us a sensible one for the courts to adopt.

3. The publicity concerns which design a substantial part of the advertising material, lithographed and printed matter, etc., which are shipped in interstate commerce come within the definition of the Act. These firms occupy about 6.5% of the rentable area and about 7.5% of the rented area of the building. This, added to the space occupied by the management groups yields totals of 32.5% and 36.5% respectively.

4. For the purpose of the statute, the sales agencies representing mining and manufacturing concerns are engaged in the production of goods for commerce. The Act covers "goods" until "their delivery into the actual physi-

cal possession of the ultimate consumer." Section 3(i) [29 U. S. C. A. §203(i)]. And "production" is defined to include "handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof." Section 3(j) [29 U. S. C. A. §203 (j)]. Thus, transportation of goods until their delivery to the ultimate consumer is "production" as defined by the statute. A sales agent who procures the contracts in performance of which the goods are "transported" is therefore engaged in the production of goods for commerce, since he is "necessary" to the "transporting." It may be contended that such a construction would bring all retailers within the Act and that Congress had no such intention. §13(a) (2) of the Act [29 U. S. C. A. §213(a) (2)], however, specifically excludes employees "engaged in any retail or service establishment, the greater part of whose selling or servicing is in intrastate commerce." This would indicate that where the "selling or servicing is in [interstate] commerce" the employees are to be included in the scope of the Act.

Moreover, sales agents may be considered as engaged in "handling" the goods by arranging their transfer from one person to another. That no physical contact with the goods is necessary we pointed out in the *Borella* case. Cf. *Kirschbaum Co.* v. *Walling, supra.* And §13(a) (5) [29 U. S. C. A. §213(a) (5)] specifically excludes employees engaged in "marketing" and "distributing" of certain designated products. By implication, marketing and distributing of other products would seem to be included within the Act.

Furthermore, the activity of the sales agents is economically necessary to the production of goods. As Mr. Justice Jackson recently pointed out, the word "necessary" in the statute is not to be construed so rigidly as to include within the Act only those essential to the actual manufacture of the goods. *Armour and Co.* v. *Wantock,* —— U. S. —— (Dec. 4, 1944).

These sales agencies represent occupancy of about 9.5% of the available area and 10.5% of the rented area. Adding the space they occupy to that occupied by executive offices and publicity concerns yields the result that the portion of the building occupied by firms engaged in the production of goods for interstate commerce is 42% of the rentable area and 48% of the rented area.

Decisions of other Circuits which reached a contrary view seem to have rejected the rationale to which we committed ourselves in the *Borella* case and to which we shall adhere here.

Reversed.

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Supreme Court of the United States

OCTOBER TERM, 1944

No. 688

THE BORDEN COMPANY,

Petitioner,

against

JOSEPH BORELLA, CHARLES J. BURKE, WALTER CROSS, WILLIAM L. DeGRAAF, JOHN B. DONEGAN, STANLEY GAJDA, EDWARD GRAMCKO, STANLEY GRZECK, OLE HOFSETH, WILLIAM KAY, ALEXANDER KRUPICA, WILLIAM LENDO, THOMAS LO SASSO, ROBERT A. MARSHALL, WALTER C. MENYHART, JAMES McCARTHY, MICHAEL NOVEMBER, LEONARD B. QUINN, ANDREW RUEB, THOMAS M. TREACY AND JESUS ECHEVARRIA,

Respondents.

BRIEF FOR PETITIONER

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Supreme Court of the United States

OCTOBER TERM, 1944

No. 688

THE BORDEN COMPANY,
Petitioner,
against
JOSEPH BORELLA, CHARLES J. BURKE, WALTER CROSS, WILLIAM L. DEGRAAF, JOHN B. DONEGAN, STANLEY GAJDA, EDWARD GRAMCKO, STANLEY GRZECK, OLE HOFSETH, WILLIAM KAY, ALEXANDER KRUPICA, WILLIAM LENDO, THOMAS LO SASSO, ROBERT A. MARSHALL, WALTER G. MENYHART, JAMES McCARTHY, MICHAEL NOVEMBER, LEONARD B. QUINN, ANDREW RUEB, THOMAS M. TREACY and JESUS ECHEVARRIA,
Respondents.

BRIEF FOR PETITIONER

Opinions of Courts Below

The opinion of the District Court (R. 102-106) is reported in 52 F. Supp. 952.

The majority and dissenting opinions of the Circuit Court of Appeals, Second Circuit (R. 128-132) are reported in 145 F. (2d) 63.

Jurisdiction

Judgment of the Circuit Court of Appeals for the Second Circuit which petitioner seeks to have reviewed was filed on August 18, 1944 (R. 133). The petition for a

writ of certiorari was filed herein on November 16, 1944. The order of this Court granting certiorari was filed January 2, 1945 (R. 134).

The jurisdiction of this Court is based on Section 240 of the Judicial Code, as amended (Act of March 3, 1891, c. 517, Sec. 6, 26 Stat. 828; Act of March 3, 1911, c. 231, Sec. 240, 36 Stat. 1157; Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938; U. S. C., Title 28, Sec. 347).

Statement of Case

The Circuit Court of Appeals for the Second Circuit ruled by a divided court that building service and maintenance employees, namely, porters, watchmen and elevator operators employed by petitioner, The Borden Company, in its office building at 350 Madison Avenue in the City of New York are engaged in the production of goods for commerce within the meaning of Section 7(a) of the Fair Labor Standards Act of 1938 (Sec. 7, 52 Stat. 1060, June 25, 1938, 29 U. S. C., Sec. 207(a)) and, therefore, entitled to overtime compensation under such Act (R. 128-132).

The ruling was made in reversing a judgment of the United States District Court for the Southern District of New York, which judgment was in favor of the petitioner and against respondents on the issues in the action on the merits (R. 121-122). The theory of said ruling was that though respondents had no relationship or tie with actual production of goods, they were engaged in the production because their work was "necessary" to the executives, accountants and other employees of The Borden Company whose office work in turn was necessary for the production of The Borden Company's products in distant places (R. 128-132).

Such judgment of the District Court was rendered in an action brought by the respondents who claimed in their complaint that they were engaged in commerce and the production of goods for commerce and entitled to recover over-

time compensation and reasonable counsel fees under the Fair Labor Standards Act of 1938 (R. 3-6). The petitioner interposed an answer in which it denied that the respondents were engaged in commerce or the production of goods for commerce and asserted that no manufacturing was done in the building owned by petitioner in which respondents were employed, that no goods were produced for commerce in such building and that the respondents were not covered by the Fair Labor Standards Act of 1938 (R. 7-11).

Petitioner, a New Jersey corporation, owns a twenty-four story office building at No. 350 Madison Avenue in the City, County and State of New York (R. 117, 128) in which it maintains its own office and it occupies, in whole or in part, approximately seventeen of the twenty-four floors and 58% of the total rentable area (R. 118, 128). The remainder of the building is occupied by various tenants who do not produce, manufacture, handle, process or in any other manner work on any goods in said building (R. 119, 120, 129).

While petitioner's business is that of processing, manufacturing, selling and distributing fluid, condensed and evaporated milk, casein ice cream, butter, cheese and various other products (R. 117, 128) such activities are not carried on in its office building involved in this case (R. 119, 128, 129). In other words, to use the language of the Act, petitioner does not produce, manufacture, handle, process or in any other manner work on any goods in said office building (R. 119, 128, 129). Such activities are carried on in various plants and factories of the petitioner throughout the United States and Canada (R. 117, 128).

The president, executive vice president, vice presidents, treasurer, assistant treasurers, secretary, assistant secretaries and other officers and subordinate employees of the petitioner are housed in said building and the board of directors of the petitioner holds its regular and special meetings therein. (R. 118, 128, 129).

The petitioner directs, supervises, manages and controls its entire business through the aforesaid directors, officers and employees (R. 118, 128).

In this building much of the advertising is devised though none of it is printed there (R. 118, 129). Labels for petitioner's products are designed in this building and some photostating takes place there (R. 119, 129).

The respondents are building maintenance employees, namely, porters, elevator operators and watchmen who are employed by petitioner in connection with the operation and maintenance of petitioner's office building (R. 118, 129).

The Circuit Court of Appeals accepted and adopted the facts as found by the Trial Judge (R. 117-120, 128, 129).

While the respondents claim that they were engaged in commerce and also in the production of goods for commerce within the meaning of the Fair Labor Standards Act of 1938 (R. 5) the Circuit Court of Appeals held that they were not engaged in commerce (R. 129) but were engaged in the production of goods for commerce (R. 129-132).

Specification of Errors

The Circuit Court of Appeals for the Second Circuit erred in holding that the respondents are engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act of 1938.

Relevant Provisions of Statutes Involved

Fair Labor Standards Act of 1938—(Act of June 25, 1938, c. 676, 52 Stat. 1060, 29 U. S. C., Sec. 201-219).

"Sec. 3. As used in this Act——

• • •

"(b) 'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof." (29 U. S. C. §203(b))

"(j) 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an em-

ployee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State." (29 U. S. C. §203(j))

"Sec. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce——

"(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

"(2) for a workweek longer than forty-two hours during the second year from such date, or

"(3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." (29 U. S. C. §207(a))

ARGUMENT

POINT I

The respondents are not engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act of 1938.

The Circuit Court of Appeals for the Second Circuit, held that the respondents in the case at bar are not engaged "in commerce" within the meaning of the Fair Labor Standards Act of 1938 but that they are engaged "in the production of goods for commerce" within the meaning of such Act.

It was because of this holding that such employees are engaged in the production of goods for commerce that

petitioner applied to this Court for a writ of certiorari. The order granting certiorari was filed on January 2, 1945. (R. 134).

In the case of *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, this Court promulgated a test to be applied in determining whether an employee is engaged "in the production of goods for commerce" within the meaning of the Fair Labor Standards Act. According to this test an employee is engaged in such production if his work has such "a close and immediate tie" with the process of production as to be "an essential part" thereof; he is not engaged in such production if his work "has only the most tenuous relation to, and is not in any fitting sense" necessary thereto. This test has since been used by this Court and all other Federal Courts (the Circuit Court of Appeals for the Second Circuit excepted) in cases involving employee coverage under the Act.

Applying this test in the case of *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, and in the case of *Walton* v. *Southern Package Corp.*, 320 U. S. 540, this Court held that the work of the building service employees therein considered had this required "close and immediate tie" with production. Such service employees worked in the buildings wherein goods were physically produced and they made a clear and convincing evidentiary demonstration of the existence of a "close and immediate tie" between their work and production. In the case of *Armour & Co.* v. *Wantock*, 323 U. S. 126, this Court held that the work of the fire fighters therein considered likewise was of such a nature as to bring them within the coverage of the Act. Such fire fighters worked directly in connection with the building wherein goods were physically produced and they likewise made a clear and convincing evidentiary demonstration of the existence of this "close and immediate tie" between their work and production.

The respondents have not made the same demonstration in the case at bar as was made by the building service employees in the case of *Kirschbaum Co.* v. *Walling*, 316

U. S. 517, and in the case of *Walton* v. *Southern Package Corp.*, 320 U. S. 540, or by the fire fighters in the case of *Armour & Co.* v. *Wantock*, 323 U. S. 126.

The respondents in the case at bar are obviously not engaged in the physical production of goods. They are not engaged in "producing, manufacturing, mining, handling, transporting or in any other manner working on * * * goods." (Sec. 3(j) Fair Labor Standards Act of 1938). They perform their respective servicing activities in the petitioner's office building and this building is situated far from the petitioner's plants and factories, in which plants and factories there are employees who are engaged "in producing, manufacturing, * * * handling, transporting or * * * working on * * * goods, or in any process or occupation necessary to the production thereof * * *." (Sec. 3(j) Fair Labor Standards Act of 1938)

The narrow question now presented to this Court is whether the respondents thus distantly removed from production are engaged in occupations necessary to such production.

Determination of this question is dependent upon a judicial construction of Sec. 3(j) of the Fair Labor Standards Act.

The judicial function of construing the law, does not include the legislative function of making the law. That point this Court made in the following part of its opinion in the case of *Western Union Telegraph Company* v. *Lenroot*, U. S. , 89 L. ed. 289:

> "But we take the Act as Congress gave it to us, without attempting to conform it to any notions of what Congress would have done if the circumstances of this case had been put before it."

The Circuit Court of Appeals for the Second Circuit took a diametrically opposite stand in its opinion in the case at bar when it said:

> "We can best reach the meaning here, as always, by recourse to the underlying purpose, and, with that

> as a guide, by trying to project upon the specific occasion how we think persons, actuated by such a purpose, would have dealt with it, if it had been presented to them at the time." (R. 130)

In other words, the Circuit Court of Appeals for the Second Circuit based its decision not upon a construction of the pertinent provisions of the Act, but upon how it thought Congress would have dealt with the respondents if they had been presented to Congress at the time. This is a legislative rather than a judicial approach, and explains while it does not justify the decision in the case at bar. It is respectfully submitted that if the Circuit Court of Appeals for the Second Circuit had adhered to its legitimate function of construing the law, it would have handed down an entirely different decision.

In the case of *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, this Court not only designated the correct approach to construing the Fair Labor Standards Act, but in the following part of its opinion it pointed out that in this process of construing due consideration must be given to the fact that there are constitutional limitations upon Congressional legislative power and furthermore, that in enacting the Fair Labor Standards Act, Congress exercised its constitutionally limited legislative power only to a limited extent.

> "Federal legislation of this character cannot therefore be construed without regard to the implications of our dual system of government." (p. 520)
>
> • • •
>
> "We cannot, therefore, indulge in the loose assumption that, when Congress adopts a new scheme for federal industrial regulation, it thereby deals with all situations falling within the general mischief which gave rise to the legislation. Such an assumption might be valid where remedy of the mischief is the concern of only a single unitary government. It cannot be accepted where the practicalities of federalism—or, more precisely, the underlying assumptions of our dual form of government and the consequent

presuppositions of legislative draftsmanship which are expressive of our history and habits—cut across what might otherwise be the implied range of the legislation. Congress may choose, as it has chosen frequently in the past, to regulate only part of what it constitutionally can regulate, leaving to the States activities which, if isolated, are only local." (p. 521)

• • •

"The history of the legislation leaves no doubt that Congress chose not to enter areas which it might have occupied. As passed by the House, the bill applied to employers 'engaged in commerce in any industry affecting commerce.' See H. Rep. No. 2182, 75th Cong., 3rd Sess., p. 2; 83 Cong. Reg. 7749-50. But the bill recommended by the conference applied only to employees 'engaged in commerce or in the production of goods for commerce.' H. Rep. No. 2738, 75th Cong., 3rd Sess., pp. 29-30; 83 Cong. Rec. 9158, 9266-67. Moreover, in one of its intermediate stages, the measure incorporated the *Shreveport* doctrine, *Houston, E. & W. T. Ry. Co.* v. *United States, supra*, in that it was specifically made applicable to intrastate production which competed with goods produced in another State, S. 2475, 75th Cong. 3rd Sess., as recommitted December 17, 1937 §8(a). But, as reported by the House Committee on Labor, this provision was deleted. S. 2475, *supra*, as reported April 21, 1938; see H. Rep. 2182, *supra*." (pp. 522-523)

These are the limitations upon the scope of the Fair Labor Standards Act and these limitations must be recognized in any judicial construction of such Act. Without the guidance afforded by a conscious recognition of these limitations, what is ostensibly a judicial construction of the Act may in reality be a judicial amendment thereof.

It was due largely to the fact that the Circuit Court of Appeals for the Second Circuit failed to give appropriate consideration to these limitations that it erroneously held that the respondents in the case at bar who perform purely local functions in petitioner's office building come within the purview of the Act.

These limitations upon the scope of the Act affect the judicial construction of every term used therein. This was made unmistakably clear by this Court in its opinion in the case of *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, when it said that the word "'Necessary' is colored by the context not only of the terms of this legislation but of its implications in the relation between state and national authority."

This brings us directly to the crux of the present case and that is the meaning of the word "necessary" as used in the phrase "in any process or occupation necessary to the production" of goods (Sec. 3(j) Fair Labor Standards Act).

The Act does not contain a definition of the word "necessary". Hence, since it is a term of ordinary speech, it means what it means "in ordinary intercourse in this context." (*Western Union Telegraph Company* v. *Lenroot*, U. S. , 89 L. ed. 289). This Court stressed the same idea in the case of *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U. S. 607, when it said:

> "Legislation introducing a new system is at best empirical, and not infrequently administration reveals gaps or inadequacies of one sort or another that may call for amendatory legislation. But it is no warrant for extending a statute that experience may disclose that it should have been made more comprehensive. 'The natural meaning of words cannot be displaced by reference to difficulties in administration.' *Commonwealth* v. *Grunseit* (1943) 67 C. L. R. 58, 80. For the ultimate question is what has Congress commanded, when it has given no clue to its intentions except familiar English words and no hint by the draftsmen of the words that they meant to use them in any but an ordinary sense. * * * After all, legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him." (pp. 617-618)

The terms engaged "in the production of goods" or "in any . . . occupation necessary to the production" of goods

are not technical terms. (Sec. 3(j) Fair Labor Standards Act) Hence, they are "addressed to the common run of men" and are therefore "to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him."

Ordinary men throughout this country have relied upon these ordinary words and their understanding has generally been that these words are not broad enough to bring office building service employees within the ambit of the Act. In this understanding they have been fortified by all the United States District Courts and Circuit Courts of Appeals which have passed upon the question.

Petitioner does not contend that the word "necessary" is synonymous with "indispensable", "essential" or "vital" (*Armour & Co.* v. *Wantock*, 323 U. S. 126).

But petitioner does contend that an occupation is not necessary if it merely has a "tenuous relation to" production or is necessary in an "ultimate sense" to production (*Kirschbaum Co.* v. *Walling*, 316 U. S. 517).

This Court in defining the word "necessary" as used in the Act has used the terms "close and immediate tie with", "essential part of", (*Kirschbaum Co.* v. *Walling*, 316 U. S. 517), "intimately related" and "connection * * * quite substantial" (*Warren-Bradshaw Co.* v. *Hall*, 317 U. S. 88).

By these definitions those who are necessary to others who in turn are necessary to still others who are engaged in actual production are not themselves engaged in production. Those who are twice removed from production would not have a "close and immediate tie with" production.

If these definitions are discarded then certainly a railroad which transports goods would be necessary to production and thus engaged in the production of goods for commerce. Maintenance-of-way men necessary to railroading would likewise be engaged in production and the cook who feeds them being necessary to the maintenance-of-way workers would also be necessary for production and so, engaged in production.

But in *McLeod* v. *Threlkeld*, 319 U. S. 491, this Court said at page 493:

> "McLeod was not engaged in the production of goods for commerce. His duties as cook and caretaker for maintenance-of-way men on a railroad lie completely outside that clause."

With respect to the loft building service employees in the case of *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, this Court said:

> "The normal and spontaneous meaning of the language by which Congress defined in § 3(j) the class of persons within the benefits of the Act, * * * encompasses these employees, in view of their relation to the conceded production of goods for commerce by the tenants." (p. 524)

With respect to the office building service employees in the case at bar, however, "The normal and spontaneous meaning of the language" debars them in view of their tenuous, remote and insubstantial relation to the production of goods.

In the recent case of *Western Union Telegraph Company* v. *Lenroot*, U. S. , 89 L. ed. 289, this Court in its opinion, among other things, stated:

> "The Government contends that in defining 'produced' the statute intends 'handled' or 'worked on' to mean not only handling or working on in relation to producing or making an article ready to enter interstate transit, but also includes the handling or working on which accomplishes the interstate transit or movement in commerce itself. If this construction is adopted, every transporter, transmitter, or mover in interstate commerce is a 'producer' of any goods he carries. But the statute, while defining 'produced' to mean 'handled' or 'worked on' has not defined 'handled' or 'worked on.' These are terms of ordinary speech and mean what they mean in ordinary intercourse in this context. They serve a useful purpose when read to relate to all steps, whether

> manufacture or not, which lead to readiness for putting goods into the stream of commerce. One who packages a product, or bottles a liquid, or labels, or performs any number of tasks incidental to preparing for shipment might otherwise escape the Act, for in a sense he neither manufactures, produces, or mines the goods. We are clear that 'handled' or 'worked on' includes every kind of incidental operation preparatory to putting goods into the stream of commerce." (p. 296)

The same may be said with respect to "production" and occupations "necessary to . . . production". These include "every kind of incidental operation preparatory to putting goods into the stream of commerce". Respondents in the case at bar, however, do not perform any of such operations.

The petitioner's contention in the case at bar is supported by every decision handed down by Circuit Courts of Appeals and United States District Courts, excepting the decisions of the Circuit Court of Appeals for the Second Circuit in the case of *Callus* v. *10 East Fortieth Street Building, Inc.*, 146 F. (2d) 438 (Dec. 12, 1944), and in the case at bar. (*Rucker* v. *First Nat. Bank of Miami, Okl.*, 138 F. (2d) 699, C. C. A. 10, certiorari denied, 321 U. S. 769; *Lofther* v. *First Nat. Bank of Chicago*, 138 F. (2d) 299, C. C. A. 7; *Stoike* v. *First Nat. Bank of City of New York*, 290 N. Y. 195, certiorari denied, 320 U. S. 762; *Johnson* v. *Masonic Bldg. Co.*, 138 F. (2d) 817, C. C. A. 5, certiorari denied, 321 U. S. 780; *Johnson* v. *Dallas Downtown Development Co.*, 132 F. (2d) 287, C. C. A. 5, certiorari denied, 318 U. S. 790; *Convey* v. *Omaha Nat. Bank*, 140 F. (2d) 640, C. C. A. 8, certiorari denied, 321 U. S. 781; *Tate* v. *Empire Building Corporation*, U. S. District Court, Eastern District of Tennessee, 2 WH Cases, 472, not officially reported, aff'd 135 F. (2d) 743, C. C. A. 6, certiorari denied, 320 U. S. 766; *Rosenberg* v. *Semeria*, 137 F. (2d) 742, C. C. A. 9, certiorari denied, *sub nom Semerio et al.* v. *Rosenberg*, 320 U. S. 770; *Cochran* v. *Florida Nat. Bldg. Corporation*,

45 F. Supp. 830, aff'd 134 F. (2d) 615, C. C. A. 5; *Blumenthal* v. *Girard Trust Co.*, 141 F. (2d) 849, C. C. A. 3; *Building Service Employees International Union* v. *Trenton Trust Company*, 142 F. (2d) 257, C. C. A. 3; *Hinkler* v. *Eighty-Three Maiden Lane Corporation*, 50 F. Supp. 263; *Cullen* v. *Stone & Webster*, U. S. District Court, Southern District of New York, 7 WHR 147, not officially reported; *Brandel* v. *Continental Illinois Nat. Bank & T. Co.*, 43 F. Supp. 781; *Baldwin* v. *Emigrant Industrial Savings Bank*, U. S. District Court, Southern District of New York, 7 WHR 831, not officially reported; *Wideman* v. *Blanchard & Calhoun Realty Co.*, 50 F. Supp. 626, *Bozant* v. *Bank of New York*, 8 W. H. R. 68 not officially reported U. S. D. C., S. D. N. Y.).

Except for the two decisions in the Circuit Court of Appeals for the Second Circuit, all courts have put office building service employees in one category irrespective of the office activities carried on by the tenants occupying the building wherein such employees are employed. Whether the tenants in these office buildings were engaged in "interstate commerce" or whether some of the tenants in these office buildings were elsewhere engaged in the production of goods for commerce, the United States District Courts and the Circuit Courts of Appeals unanimously and consistently have held that the service employees employed in such buildings are outside the scope of the Act.

The fact that the petitioner in the case at bar is the owner of the building rather than the owner's lessee has no materiality in the determination of the question now presented to this Court. *Kirschbaum Co.* v. *Walling*, 316 U. S. 517 at 524, 525.

While in most of the cases cited above it does not appear that the tenants in the office buildings were elsewhere engaged in the production of goods for commerce, in the cases of *Rucker* v. *First Nat. Bank of Miami, Okl.*, 138 F. (2d) 699, C. C. A. 10, certiorari denied, 321 U. S. 769; *Johnson* v. *Dallas Downtown Development Co.*, 132 F. (2d) 287, C. C. A.

5, certiorari denied, 318 U. S. 790; *Johnson* v. *Masonic Bldg. Co.*, 136 F. (2d) 817, C. C. A. 5, certiorari denied, 321 U. S. 780; and *Lofther* v. *First Nat. Bank of Chicago*, 138 F. (2d) 299, C. C. A. 7, such fact does appear, yet these Courts held in accordance with the established rule for office building service employees that such service employees were not covered by the Act.

In the case of *Rucker* v. *First Nat. Bank of Miami, Okl.*, 138 F. (2d) 699, C. C. A. 10, certiorari denied, 321 U. S. 769, the plaintiffs who were elevator operators in a six story office building owned and operated by the defendant instituted an action to recover overtime compensation and liquidated damages claimed to be due them under the provisions of the Fair Labor Standards Act of 1938. The first floor of this building was used by the defendant to carry on a national banking business. The remaining floors were leased to various tenants. Some of these tenants were companies elsewhere engaged in the production of goods for commerce which used the space leased by them solely for the purpose of housing their executive and administrative offices; the other tenants were engaged in interstate and intrastate commerce; none of the tenants, however, were shown to have been engaged in the production of goods in the building. The plaintiffs conveyed the tenants and the public to and from the upper floors in the building.

The Circuit Court of Appeals, Tenth Circuit, held that the plaintiffs were not engaged in commerce or in the production of goods for commerce within the meaning of the Fair Labor Standards Act of 1938 and affirmed a judgment of the United States District Court dismissing the plaintiffs' complaint. The Court in its opinion, among other things, said:

> "Specifically, we are urged to hold that these employees, as elevator operators, were engaged in the production of goods for commerce on the authority of Kirschbaum Co. *v.* Walling, supra. In that case the court held that elevator operators and other

building employees were engaged in the production of goods for commerce, because the services which they performed were so closely and intimately associated with the actual production of goods for commerce as to be in reality a part of the process. There, concededly, the tenants occupying the building were actually engaged in the production of goods for interstate commerce, and the elevator operators in the building ran both the freight elevators which started and finished the interstate journeys of goods going from and coming to the tenants, and the passenger elevators which carried employees, customers, salesmen and visitors. In holding that elevator operators, under these facts, were engaged in the production of goods for commerce, the court said [316 U. S. 517, 62 S. Ct. 1121, 86 L. Ed. 1638]: 'in our judgment, the work of the employees in these cases had such a close and immediate tie with the process of production for commerce, and was therefore so much an essential part of it, that the employees are to be regarded as engaged in an occupation "necessary to the production of goods for commerce."' But, the court significantly observed that the criterion was necessarily one of degree and must be so considered in defining coverage under the phrase 'production of goods for commerce.' See, also, Warren-Bradshaw *v.* Hall, supra; Walling *v.* Patton-Tulley Transp. Co., 6 Cir., 134 F. (2d) 945; Hanson *v.* Lagerstrom, 8 Cir., 133 F. (2d) 120, and Consolidated Timber Co. *v.* Womack, 9 Cir., 132 F. (2d) 101.

"But the facts before us which bear upon the phrase 'production of goods for commerce' are only remotely analogous to the facts in the Kirschbaum case. The executive and administrative offices of the mining and smelting company were located in the building serviced by the elevator operators, and this company was doubtless engaged in the production of goods for commerce, but it is not shown on this record whether any of the goods were produced in the building, or that any of the employees transported to and from the offices are directly or indirectly engaged in the production of the goods. The same is true of the chat and crushed rock company, and the abstract company, which produced abstracts, some of which

were shipped in interstate commerce. In any event, the relationship is not shown to be 'close and immediate'. Under these facts it cannot be said that the activities of the elevator operators were an essential part of, or necessary to, the production of goods for commerce." (pp. 701, 702)

In the case of *Johnson* v. *Dallas Downtown Development Co.*, 132 F. (2d) 287 C. C. A. 5, certiorari denied, 318 U. S. 790, the appellants were porters and elevator operators in a building which housed, among other tenants, the agents of concerns elsewhere engaged in the production of goods for interstate commerce. In holding that such appellants were not covered by the Act the Circuit Court of Appeals, Fifth Circuit, in its opinion, among other things, said:

"we do not think that Congress intended that the Act with respect to those who are only 'engaged in commerce' should be stretched and strained to cover every person whose labor is of use or convenience or whose labor in some fashion contributes to the comfort or convenience of one who is so engaged. Overstreet *v.* North Shore Corporation, 5 Cir., 128 F. 2d 450. Clearly, Congress intended the coverage of the Act to stop somewhere, and the line bounding coverage must be drawn somewhere.

"In the Arsenal Building-Kirschbaum cases, supra, it is said by the Supreme Court: '"There is thus no point in the instant case in a demand for the drawing of a mathematical line. And what is reasonably clear in a particular application is not to be overborne by the simple and familiar dialectic of suggesting doubtful and extreme cases." Santa Cruz Fruit Packing Co. *v.* Labor Board, 303 U. S. 453, 467, 58 S. Ct. 656, 660, 82 L. Ed. 954. "What is needed is something of that common-sense accommodation of judgment to kaleidoscopic situations which characterizes the law in its treatment of problems of causation." Gully *v.* First National Bank, 299 U. S. 109, 117, 57 S. Ct. 96, 100, 81 L. Ed. 70.'

"Applying the common sense rule, we hold that Appellants are not within the coverage of the Act." (pp. 289-290)

Applying the common sense rule in the case at bar, respondents are not engaged in occupations necessary to the production of goods which production is carried on by the petitioner in its plants and factories distantly located from the building wherein the respondents work.

In the case of *Johnson* v. *Masonic Bldg. Co.*, 138 F. (2d) 817, C. C. A. 5, certiorari denied 321 U. S. 780, the plaintiffs were elevator operators and porters working in an office building which housed, among others, a company elsewhere engaged in the production of bricks and tiles for interstate commerce and a coal company elsewhere engaged in the production of coal for interstate commerce.

In the case of *Lofther* v. *First Nat. Bank of Chicago*, 138 F. (2d) 299, C. C. A. 7, the plaintiffs were elevator operators, janitors, a watchman and maintenance workers in a building which housed, among others, tenants elsewhere engaged in the production of goods for interstate commerce.

Judge Swan in his dissenting opinion in the case at bar followed the rule established by the aforesaid authorities and said that "the porters, elevator operators, and night watchmen of the defendant's office building are too remotely related to 'the production' of goods for commerce to be within the coverage of the Act. *Rucker* v. *First Nat. Bank of Miami, Okl.*, 10 Cir., 138 F. 2d 699, 702."

A search of the authorities reveals no state decisions in conflict with the aforesaid listed Federal cases or in support of the decision of the Circuit Court of Appeals for the Second Circuit in the case at bar or in support of its decision in the case of *Callus* v. *10 East Fortieth Street Building, Inc.*, 146 F. (2d) 438.

Significantly, practically all the United States District Court and Circuit Court of Appeals decisions holding that office building service employees are not covered by the Fair Labor Standards Act were handed down after this Court had decided that the loft building service employees in the case of *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, decided June 1, 1942, were covered by such Act.

Significant too is the fact that after the decision of this Court in the case of *Kirschbaum Co.* v. *Walling, supra,* this Court denied certiorari in several office building service employee suits wherein such employees had been unsuccessful in the lower courts (*Rucker* v. *First Nat. Bank of Miami Okl.*, 138 F. (2d) 699, C. C. A. 10, certiorari denied Jan. 31, 1944, 321 U. S. 769; *Stoike* v. *First Nat. Bank of City of New York*, 290 N. Y. 195, certiorari denied Oct. 11, 1943, 320 U. S. 762; *Johnson* v. *Masonic Bldg. Co.*, 138 F. (2d) 817, C. C. A. 5, certiorari denied Feb. 28, 1944, 321 U. S. 780; *Johnson* v. *Dallas Downtown Development Co.*, 132 F. (2d) 287, C. C. A. 5, certiorari denied April 19, 1943, 318 U. S. 790; *Convey* v. *Omaha Nat. Bank*, 140 F. (2d) 640, C. C. A. 8, certiorari denied March 6, 1944, 321 U. S. 781; *Tate* v. *Empire Bldg. Corporation*, U. S. D. C., E. D. of Tenn., 2 W. H. Cases 472, not officially reported, affirmed 135 F. (2d) 743, C. C. A. 6, certiorari denied Oct. 11, 1943, 320 U. S. 766; *Rosenberg* v. *Semeria*, 137 F. (2d) 742, C. C. A. 9, certiorari denied, *sub nom Semerio, et al.* v. *Rosenberg*, Oct. 18, 1943, 320 U. S. 770).

The rule promulgated in these cases should now receive this Court's explicit sanction.

Conclusion

The judgment of the Circuit Court of Appeals for the Second Circuit should be reversed.

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REPLY BRIEF FOR THE PETITIONER

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Supreme Court of the United States

OCTOBER TERM, 1944

No. 688

THE BORDEN COMPANY,

Petitioner,

against

JOSEPH BORELLA, CHARLES J. BURKE, WALTER CROSS, WILLIAM L. DeGRAAF, JOHN B. DONEGAN, STANLEY GAJDA, EDWARD GRAMCKO, STANLEY GRZECK, OLE HOFSETH, WILLIAM KAY, ALEXANDER KRUPICA, WILLIAM LENDO, THOMAS LO SASSO, ROBERT A. MARSHALL, WALTER C. MENYHART, JAMES McCARTHY, MICHAEL NOVEMBER, LEONARD B. QUINN, ANDREW RUEB, THOMAS M. TREACY AND JESUS ECHEVARRIA,

Respondents.

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Respondents.

REPLY BRIEF FOR PETITIONER

I

In the Administrator's Brief (page 10) the following statement is made with respect to the opinion of the Circuit Court of Appeals for the Second Circuit in the case at bar:

> "The court reasoned that those 'who direct the whole conduct of an industry' are engaged in 'production' as clearly as are the artisans in the factory or the dispatching clerks on the shipping platforms, ...".

That statement is diametrically opposed to the statement made by the Circuit Court of Appeals for the Second Circuit in the following part of its opinion in which it fixed the status under the Act of those employees "who direct the whole conduct of an industry":

> "The definition of 'produced' in §3(j) concludes with the clause: 'process or occupation necessary to the production thereof.' True, the Supreme Court in *A. B. Kirschbaum Co.* v. *Walling, Administrator, supra,* 525 (316 U. S. 517) cautioned us against pressing too literally the word 'necessary,' but that caution need not disturb us here. Those who direct the whole conduct of an industry—both manufacture and distribution—are 'necessary' to 'production,' if anyone is 'necessary.' As was observed over a century ago, every process of manufacture (indeed for that matter every process by which men can affect the outside world at all) may be resolved into the movement of things in space, and it would be absurd to say that, although what the artisans do in the factory, or the dispatching clerks do upon the shipping platforms, is 'necessary' to 'production,' the directions they receive that govern all the movements they impart, are not 'necessary.' " (R. 131, 132)

II

Under Point I, subdivision A, of the Respondents' Brief, the respondents take issue with the petitioner's stand that the fundamental question in the case at bar is whether the respondents are engaged in occupations necessary to production and that the determination of this question is dependent upon a judicial construction of the word "necessary" as used in Section 3 (j) of the Act. At page 34 of their brief the respondents make the following statement:

> "We disagree with this statement of the issues in this case. In our opinion the *Kirschbaum, Walton* and *Armour* cases, *supra,* effectively settle the mean-

ing of the word 'necessary' as applied to the facts of this case."

The *Kirschbaum, Walton* and *Armour* cases did not settle the meaning of the word "necessary" as applied to the facts in the case at bar. The facts in the *Kirschbaum, Walton* and *Armour* cases are entirely different from the facts in the case at bar; the circumstances under which the employees in those cases worked were entirely different from the circumstances under which the respondents in the case at bar worked.

In the case of *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, this Court held that the work of the building service employees therein considered was "necessary" to the production of goods for commerce. In arriving at this conclusion this Court had to determine the scope or meaning of the word "necessary" as applied to the facts in that case. This is borne out by the following statement in the Court's opinion: "We cannot, in construing the word 'necessary,' escape an inquiry into the relationship of the particular employees to the production of goods for commerce". (p. 525)

That is precisely what this Court must do in the case at bar. It must inquire into the relationship between the respondents whose activities are confined exclusively to the petitioner's office building at No. 350 Madison Avenue and the production of goods for commerce as carried on by the petitioner in its plants and factories throughout the United States and Canada.

The Circuit Court of Appeals for the Second Circuit in its opinion in the case at bar, concerned itself almost entirely with the consideration of the meaning or scope of the term "necessary" as used in Section 3 (j) of the Act. It was because the Circuit Court of Appeals, in the petitioner's opinion, unreasonably broadened the meaning of this term to include the respondents that the petitioner applied to this Court for certiorari.

The respondents maintain that the real question in the case at bar is "whether the activities of the *occupants* of the Borden Building constitute 'production of goods for commerce' within the meaning of the Act". (Brief for Respondents, p. 34).

The administrator and the respondents both contend that the executive, administrative and clerical employees in the Borden Company office building at No. 350 Madison Avenue are so connected with the production of goods as carried on by the petitioner in its plants and factories throughout the United States and Canada that they are a part of such production and that they are not merely engaged in occupations necessary to such production.

The Circuit Court of Appeals for the Second Circuit in its opinion in the case at bar, however, did not agree with the contention of the administrator or of the respondents. That court stated that those who direct the conduct of an industry are engaged in occupations necessary to production. It did not hold that such employees are actually engaged in production, and statements to that effect appearing in the respondents' brief, and in the administrators' brief, are absolutely erroneous.

The administrator's and the respondents' contention is furthermore entirely inconsistent with the following statement made by this Court in the case of *Kirschbaum Co.* v. *Walling*, 316 U. S. 517 at pages 524-5:

> "Nor can we find in the Act, as do the petitioners, any requirement that employees must themselves participate in the physical process of the making of the goods before they can be regarded as engaged in their production. Such a construction erases the final clause of Section 3 (j) which includes employees engaged 'in any process or occupation necessary to the production' and thereby does not limit the scope of the statute to the preceding clause which deals with employees 'in any other manner working on such goods'."

According to this statement, there are two types of employees who are engaged in the production of goods for commerce as that term is defined in Section 3 (j) of the Act, viz., those engaged in the physical process of making goods and those who are engaged in occupations necessary to the physical process of making goods.

The administrator's and the respondents' contention does violence to the lucid terminology used in Section 3 (j). In this section it is provided that "an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting or in any other manner working on such goods * * *". To come within this part of the definition of production it is clear that an employee must physically work on the goods. The next part of the definition "or in any process or occupation necessary to the production thereof * * *" covers those employees who are engaged in activities essential to such physical production of goods.

The administrator and the respondents also contend that those employees in the Borden Building who prepare writings, communications, mats for lables, and advertisements, photostats and photo offsets, are engaged in the production of goods for commerce within the meaning of the Act. The employees who are engaged in doing this work are not covered by the Act. (*Walling* v. *Goldblatt Bros., Inc.*, 128 F. (2d) 778, (C. C. A. 7th) Cert. Denied 318 U. S. 757.) None of the advertisements or labels are printed in or distributed from the said Borden Building (R. 118, 119). The communications, photostats, and photo offsets are the means used by the Company for the dissemination of information and instructions among the employees employed in its producing plants. All of these so-called goods are transmitted exclusively to the offices and plants of The Borden Company and its subsidiaries and none of which is sold or offered for sale.

These materials are not comparable with the messages which this Court held were goods within the meaning of the Act in the case of *Western Union Telegraph Co.* v. *Lenroot*, U. S. , 89 L. ed. 289.

If these activities constitute the production of goods for commerce then any person who dictates a letter for transmission across the state line is engaged in the production of goods for commerce. This would be a startling extension of the meaning of the term "production of goods."

At page 45 of their brief, the respondents list those things which they claim are "goods" produced by the employees in the Borden Building; and at page 12 of the administrator's brief, the administrator sets forth those things which he claims are "goods" produced by the employees in the Borden Company Building. With respect to the photostats and the photo offsets, the amount thereof which originates in the Borden Building is infinitesimal as compared with the total production of goods by the Borden Company (R. 100). There is no proof in the record to support the assertion in the respondents' brief on page 30 relating to the experimental kitchen that booklets of recipes were prepared for housewives or that such booklets were sent to Borden customers. With respect to the balance of the so-called "goods" which are alleged to be produced by the employees in the Borden Building the record is barren of any evidence regarding the amount thereof. This is fatal to the respondents' and the administrator's case.

III

The respondents claim that they were "engaged in interstate commerce" within the meaning of the Act. There is no merit in this contention. The Circuit Court of Appeals for the Second Circuit held that since the decision of this Court in the case of *McLeod* v. *Threlkeld*, 319

U. S. 491, it is clear that the respondents are not engaged in commerce (R. 129). The administrator has not advanced this contention in his brief.

Conclusion

The judgment of the Circuit Court of Appeals for the Second Circuit should be reversed.

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IN THE

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OCTOBER TERM, 1944

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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TEXTS:

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 688

THE BORDEN COMPANY,

Petitioner,

against

JOSEPH BORELLA, CHARLES J. BURKE, WALTER CROSS, WILLIAM L. DEGRAAF, JOHN B. DONEGAN, STANLEY GAJDA, EDWARD GRAMCKO, STANLEY GRZECK, OLE HOFSETH, WILLIAM KAY, ALEXANDER KRUPICA, WILLIAM LENDO, THOMAS LO SASSO, ROBERT A. MARSHALL, WALTER C. MENYHART, JAMES McCARTHY, MICHAEL NOVEMBER, LEONARD B. QUINN, ANDREW RUEB, THOMAS M. TREACY and JESUS ECHEVARRIA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION

Opinions Below

The opinion of the District Court (R. 102-106) is reported in 52 F. Supp. 952.

The majority and dissenting opinions of the Circuit Court of Appeals, Second Circuit (R. 128-132) are not yet reported.

Jurisdiction

Jurisdiction to review this case upon writ of certiorari is expressly conferred upon this Court by Judicial Code,

Section 240, as amended (Act of March 3, 1891, c. 517, Sec. 6, 26 Stat. 828; Act of March 3, 1911, c. 231, Sec. 240, 36 Stat. 1157; Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938; U. S. C. Title 28, Sec. 347).

Questions Presented

The primary question presented is whether the respondents were "engaged in the production of goods for commerce" within the meaning of the Fair Labor Standards Act of 1938 (52 Stat. 1060, June 25, 1938, 29 U. S. C. Secs. 201-219).

The answer to this primary question depends on the further question of whether the particular activities of the Borden Company in the Borden Building constituted "production" of goods for commerce within the meaning of said act.

The Statute Involved

The original statute, before being incorporated into the United States Code was the Act of June 25, 1938, c. 676, 52 Stat. 1060. The sections in the original Act were Sections 1 to 19, inclusive. In the Code, two hundred numbers were added to each section number, so that the section numbers in the Code run from 201 to 219, inclusive.

For purposes of brevity we shall, hereinafter, refer to the Fair Labor Standards Act of 1938 as the "Act", or the "statute".

Section 207—Maximum Hours:

> "(a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—
>
> "(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

"(2) for a workweek longer than forty-two hours during the second year from such date, or

"(3) for a workweek longer than forty hours after the expiration of the second year from such date.

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

Section 203—Definitions:

"As used in sections 201-219 of this title—

* * * * * * *

"(b) 'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

* * * * * * *

"(j) 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or *in any process or occupation necessary to the production thereof*, in any State." (Italics ours.)

Section 216—Penalties; Civil and Criminal Liability:

"(b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

Statement

This case involves the scope of the Fair Labor Standards Act of 1938 (U. S. Code, Title 29, Chap. 8, Secs. 201-219) in relation to a particular phase of industrial activity. Under Section 207(a) an employer must pay overtime compensation to any of his employees who is "engaged in commerce or in the production of goods for commerce". Section 203(j) provides that "for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed * * * in any process or occupation necessary to the production thereof * * *".

The employees here are engaged as service and maintenance men in a building in New York City called the Borden Building. The activities carried on in such building will be described in detail hereinbelow.

Section 216(b) makes an employer who violates the provisions of Section 207 liable to the employees affected in the amount of their unpaid overtime compensation and in an additional equal amount as liquidated damages, permits employees to maintain an action to recover such liability and directs the court in such action, in addition to any judgment awarded to the plaintiffs, to allow a reasonable attorney's fee to be paid by the defendant.

The precise question before the Court below was whether the Act extended to such service and maintenance employees in the Borden Building.

The Borden Company occupies seventeen floors, in whole or in part, of the Borden Building, located at 350 Madison Avenue, New York City, which has twenty-four floors, and which is owned by it. *From the offices in said building, an elaborate system of interstate production is controlled and given its operating force.* This particular system is such that without the activities carried on in its offices in the Borden Building, the Company's manufacturing plants located in various states in the country (R. 13) could not operate,

any more than they could without their plant machinery or plant superintendents. These particular activities in the Borden Building constitute a vital element in the Borden Company's interstate production system. The details of the peculiar and unique manufacturing set-up of this Company are set forth hereinbelow.

This case presents facts clearly different from those present in the ordinary case of corporate home office supervision.

Nature of Respondents' Activities

The respondents are service and maintenance employees in the Borden Building, and are employed by the petitioner in connection with its operation and maintenance of said building. Some of the respondents are porters, some are watchmen, and others are elevator men (Finding 7, R. 118).

The respondents performed work ordinarily done by porters, watchmen and elevator men in such a building. The details of their work are set forth in the deposition of Marshall (R. 83-97). The porters clean lavatories, corridors, stairways and other places in the building, and have a few incidental duties, such as moving furniture, packing waste paper, distributing towels, etc. The night watchmen protect the building and its contents from fire and theft by making the rounds of the building and punching "Watchmen's keys" distributed in seventy-four stations throughout the building. They also require night visitors to the building to sign a register. The elevator men run the eight elevators in the building. The elevators are used by all the occupants of the building.

In short, the respondents contribute and are essential to making the Borden Building safe, clean, and habitable for the use of its occupants.

The Building and Its Occupants

The building is a twenty-four story office building at No. 350 Madison Avenue in the City, County and State of

New York, and is owned by the petitioner (Finding 6, R. 117). The total rentable area of the building is about 198,018 square feet (R. 101). During the period in question the Borden Company occupied 115,710 square feet (R. 101), which constitutes about 58% of the total rentable area. The space used by the Borden Company takes up in whole or in part approximately seventeen of the twenty-four floors, and the building is the home office of the company (Finding 8, R. 118). The remainder of said building not occupied by the Borden Company is occupied pursuant to written agreements of lease by various persons, firms, partnerships, associations and corporations (Finding 17, R. 119), and none of said tenants produce, manufacture, handle, process or in any other manner work on any goods in said building (Finding 18, R. 120). We shall therefore limit our discussion to the activities of the Borden Company in the building.

Some General Facts About the Borden Company

The Company is a New Jersey corporation (Finding 1, R. 117). It is licensed to do business and is doing business in the State of New York and in the Southern District of New York (Finding 2, R. 117).

The Company is engaged in the business of processing, manufacturing, selling and distributing fluid, condensed, evaporated milk, casein, ice cream, butter, cheese and various other products (Finding 3, R. 117). It also manufactures various other products. During the period in question, its gross sales exceeded $200,000,000 per year (R. 100). *It does business throughout the United States and in foreign countries* (Finding 4, R. 117). *The company owns and operates plants and factories in the United States and Canada* where it processes, manufactures, and from which it sells and distributes its products (Finding 5, R. 117; R. 13) across state lines.

The Activities of the Borden Company in the Borden Building

There are 822 employees of the Borden Company working in the Borden Building (R. 98). We shall analyze their activities in some detail, in most cases dealing only with large groups. We regret having to burden the Court with such detail, but it is unavoidable, since, in our view of the law, each case of this kind must be decided on its own facts, and the issues raised by the petition for certiorari cannot be properly analyzed without a scrutiny of the facts.

The Borden organization includes "General Departments", "Divisions", "Departments", "Bureaus", etc. There is a distinction between general departments relating to the company as a whole, and departments which are connected merely with Divisions (R. 51-52).

The following is an organizational chart of the activities of the Borden Company in the Borden Building:

Board of Directors
Executive Officers
General Accounting Department
General Advertising Department
Legal Department
Income Tax Department
Bureau of Insurance
Public Relations Department
The Various "Divisions" of the Company:
—Manufactured Products Division
—Manufacturing Department
—Sales Department
—Credit Department
—Cashier's Department
—Accounting Department
—Controller
—Disbursing
—Bank Reconciliation
—Cost Accounting
—Stock
—Sales Tabulation

—Casein Division
—National Milk Sugar Division
—Special Products Division
—Cheese Division
—Ice Cream Operation
—Fluid Milk Operation

Departments Covering Several Divisions:
—Purchasing Department
—Label Department
—Export Department
—Real Estate Department
—Safety Bureau
—Payroll Tabulation Department
—Central Transcribing Bureau
—Telephone and Switchboard
—Traffic Department
—Stationery Department
—Mailing Department
—Photostat and Photo-offset Department
—Experimental Kitchen

We cannot, within the limits of this brief, go into detail about the specific activities of each of these groups. However, we call the attention of the Court to the activities of the following groups of Borden employees in the Borden Building:

The Manufacturing Department of the Manufactured Goods Division;

The Accounting Department of the Manufactured Goods Division;

The Purchasing Department.

The Manufactured Products Division is located on several floors, and has charge of all manufactured products except casein and milk sugar (R. 43), which have their own Divisions.

The Manufactured Products Division has several departments and sub-departments. Among them are the Manufacturing Department and the Accounting Department.

The Manufacturing Department

This Department (R. 43-47) occupies the entire seventh floor of the building. It controls the superintendents of the various factories throughout the United States. It supervises the instructions for running the plants which manufacture all products of the Borden Company except casein and milk sugar. It receives advice daily from the various factories as to the pounds of milk received. If the supply of milk is inadequate for economical operation, this department will issue instructions to some other factory to divert their milk to the plant, or will change running instructions of the plant from either condensed to evaporated or some other manufactured product which the plant is qualified to run. It instructs the various factories as to when they should decrease production, and when they should change the form of production. It receives requests from superintendents of the individual plants and factories for instructions in connection with equipment, repairs, labor problems, purchase of trucks and automobiles. It determines new methods of manufacture and sends instructions to all the factories to use such new methods. It sends instructions throughout the United States. It controls the supply of raw materials for each plant. It controls the size, quantity and production of ten receptacles for Borden products, and is in charge of tin shops and machine shops where the Company makes tin cans. It appoints the top manufacturing personnel for the various plants. It receives audits from the individual factory superintendents as to their requirements, and sets up budgets for such factories. It approves the letting of contracts for various business matters that arise in connection with the operation of such plants. It makes contracts for the purchase of heavy plant expansion, issues orders for the construction of increased facilities, arranges the financing of plant expansion, and pays the bills for heavy equipment contracted for. Such intimate and instantaneous control of plant operations all over the United States from

a building in New York City might almost seem to be impossible. It is true that this department does have two efficiency engineers who travel to and inspect the plants, and report to this department. It is also true that long distance telephone facilities are available (R. 26). But the real explanation is that this department has a *teletype machine with direct wires from the Borden Building to the various factories all over the nation* (R. 26). As Mr. Wyman admitted (R. 44) the manufacturing department in the Borden Building is the "*pulse* of the supply and demand condition of the individual factories and plants of the Borden Company throughout the United States". The pulsations of the production ideas created and worked on in the Borden Building flow instantaneously over the teletype wires. The factories make products for shipment across state lines, and these products are sent across state lines as a result of the direction and control exercised by the manufacturing department in the Borden Building (R. 44). In effect, there is a regular system of interstate production.

Accounting Department

Next we discuss the Accounting Department (R. 13-14; 45; 53-55) of the Manufactured Products Division. This department occupies the eighth, ninth and part of the tenth floors of the building, and is in charge of Mr. Wyman who has the title of Controller.

The controller of this department supervises this entire department. His office issues all accounting instructions to various plants and factories of the defendant throughout the United States with respect to reporting to the home office at 350 Madison Avenue as to

(a) production figures, disbursements, receipts and shipment of goods from plants and factories;

(b) instructions pertaining to deductions of social security and state unemployment insurance, taxes and the proper method of so reporting on payroll records (R. 13).

The controller's office establishes and perfects financial statements with respect to the recording of sales, costs of sales, deductions, selling and administration expenses to arrive at net profits (R. 14). It supervises a staff of traveling auditors who visit each plant and factory for the purpose of internal control (R. 14). It supervises personnel matters in connection with factory and subsidiary employees (R. 14). The controller visits the defendant's plants and factories from an administrative standpoint and establishes accounting procedure (R. 54-55). He directs, supervises and controls said plants and factories from an accounting view. He offers suggestions as to the increase and decrease of personnel, and sometimes employs personnel. He also instructs the superintendents of defendant's plants and factories as to methods of procedure developed at the home office for reports to the home office so that there is a systematic running of the Manufactured Products Division from the home office at 350 Madison Avenue (R. 55). Accounting reports prepared in the Borden Building are sent across state lines to plants outside of the state (R. 54). His department acts as a control system of all the plants and factories of this division throughout the country (R. 50).

There are five sub-departments of the Accounting Department of the Manufactured Products Division: Disbursing, Bank Reconciliation, Cost Accounting, Stock and Sales Tabulation. The disbursing sub-department (R. 49-50) is located on the eighth floor. It pays all bills and invoices. It pays brokers' commissions and makes payments on contracts. It also keeps track of and distributes factory disbursements. It checks to see whether factories have received purchases, before paying the bills. It covers all the factories and plants of the Manufactured Products Division throughout the nation.

The Bank Reconciliation sub-department (R. 47-48) is located on the eighth floor. It covers the bank accounts of the plants all over the country. The local banks send duplicate bank statements to the superintendents of the

various factories. The superintendent retains the duplicate but forwards the original bank statement and the vouchers to this sub-department which checks them for errors.

The Cost Accounting sub-department (R. 48-49) is located on the eighth floor of the building. It devises and applies methods of cost accounting to arrive at the individual factory cost of individual manufactured products. The factories send in the figures of expenditures, and this sub-department collects and analyzes them. Its computations are sometimes used by the Manufactured Products Division as a basis for stopping production, increasing production, or changing the methods of production. The computations are also used by the General Accounting Department in preparing a profit and loss statement for the Borden Company. This sub-department also makes estimates of cost of production of proposed new products. It also does similar work for the Cheese Division (R. 48). It keeps records of raw materials and supplies (R. 51).

The Stock sub-department (R. 50-51) is located on the ninth floor of the building. Its records cover finished goods only. It works in conjunction with the Sales Tabulation sub-department. It keeps a perpetual running inventory of finished goods for every plant and factory. It receives semi-monthly and monthly reports of factory production all over the United States. It adds production and subtracts sales from the running inventory and arrives at an inventory at the end of the outlay. The inventory figures are turned over to the Cost sub-department for use in its computations.

The Sales Tabulation sub-department (R. 51) is located on the ninth floor. Its function is to tabulate all sales made to customers. Its computations are used by the Stock sub-department in computing the running inventory, and also to check Accounts Receivable from Sales.

Purchasing Department

The Purchasing Department (R. 69-71) occupies the entire thirteenth floor of the Borden Building and is in charge

of Mr. Morse. The various factories communicate their needs to the vice-president in charge of each operation, and he advises the purchasing department of such needs. Representatives of this department also visit the factories to determine their requirements. This department purchases the needed supplies from visiting salesmen. It also negotiates and makes contracts for the purchase of the needed articles. It purchases substantially all the major supplies, machinery and raw materials needed by the plants and factories for the production of goods. Among the articles it purchases are sugar, coal, tinplate, labels, fibre boxes, wooden boxes, coffee, cleaning powder, heavy machinery, cocoa, malt, liquor, bottles, bottle caps, ice cream cartons, and barrels. These purchases cross state lines and are used to produce goods for shipment across state lines.

Criticism of Petitioner's Summary Statement

At pages 2 to 4 of its petition, petitioner sets forth its "Summary Statement." There are several assertions therein to which we take exception.

In the second sentence in the first full paragraph on page 2, petitioner attempts to summarize the theory underlying the ruling of the Circuit Court of Appeals in the case at bar. Petitioner asserts that such theory was that "the respondents had no relationship or tie with the actual production of goods." As we shall later show, this assertion is plainly wrong.

In the fifth full paragraph on page 3 petitioner asserts that the activities carried on by the Borden Company in the Borden Building do not constitute "production". Such assertion begs the very question involved in the case at bar.

In the first full paragraph on page 4 petitioner refers to finding of fact 9 (R. 118) which states that the petitioner "directs, supervises, manages and controls its entire business through the aforesaid directors, officers and employ-

ees", and in the fourth full paragraph on page 4, petitioner asserts that the "Circuit Court of Appeals accepted and adopted the facts as found by the Trial Judge." It is true that the Circuit Court of Appeals did say: "The facts, which are not in dispute, are sufficiently stated in the findings of the trial judge" (R. 128). However, the adoption by the Circuit Court of Appeals of finding 9 should not be construed to mean that the Circuit Court of Appeals treated the case at bar as the case of an ordinary home office building having only a general remote supervision over the activities at its factories. The Circuit Court of Appeals had all the detailed facts before it, and also stated in its opinion (R. 128-129):

> "The manufacturing all takes place in factories in the United States and Canada, which it owns and operates; but its executive and administrative activities—the supervision, management and control of the entire business—are all centered in an office building in New York, * * *. * * * This is the spot from which all directions go out as to what shall be bought, what shall be manufactured, where the products shall be distributed, etc."

Argument

Petitioner urges three reasons for the granting by this Court of a writ of certiorari:

I. An alleged conflict between the decision of the Circuit Court of Appeals in the case at bar and the decision of the Circuit Court of Appeals for the Tenth Circuit in the case of *Rucker* v. *First Nat'l Bank of Miami, Okla.*, 138 F. (2d) 699;

II. An alleged conflict between the decision of the Circuit Court of Appeals in the case at bar, and the reasoning of this Court in *Kirschbaum* v. *Walling*, 316 U. S. 517, and in *Walton* v. *Southern Package Corporation*, 320 U. S. 540, and the reasoning of various Circuit Courts of Appeals and District Courts;

III. That this Court should settle an important question of federal law which has not been but which should be settled by this Court.

We submit that there is no substance to any of these alleged reasons and in support of our position that the writ should be denied we submit the following points, varying the sequence of petitioner's points in the interest of clarity.

POINT I

The decision of the Circuit Court of Appeals in the case at bar is not in conflict with the reasoning in the case of *Kirschbaum* v. *Walling*, 316 U. S. 517, or *Walton* v. *Southern Package Corp.*, 320 U. S. 540.

At page 5 of its petition, petitioner urges that the decision of the Circuit Court of Appeals in the case at bar is in conflict with the reasoning of this Court in *Kirschbaum* v. *Walling, supra,* and in *Walton* v. *Southern Package Corp., supra.* But in Point II of its supporting brief (pp. 15-22) where it expands the argument, it entirely ignores the *Walton* case. We believe that the omission of the petitioner in its Point II was not mere inadvertence.

We respectfully submit that there is no such conflict of reasoning as is alleged by the petitioner.

Let us examine the opinion of the Circuit Court of Appeals in the case at bar.

That Court first properly distinguished between the phrases "engaged in commerce" and "engaged in the production of goods for commerce".

The further reasoning of the Circuit Court of Appeals in the case at bar may best be analyzed by reference to two hypothetical cases:

Case A

Assume that a producing company has as usual, two classes of employees: 1) artisans, shipping clerks and

others, who come in actual contact with, or make or handle the raw materials or the finished goods, and 2) executive and administrative agents and employees who do not come in physical contact with the goods at any stage of their production, but who direct, supervise, manage and control the whole conduct of the company. Assume further that both classes of employees are housed in *one* building with only one group of caretakers.

The Circuit Court recognized that where all the activities of the company take place in *one* building and where the quarters occupied by those employees actually in contact with the raw materials or finished goods were greater in area than those occupied by the administrative officials, the *Kirschbaum* case governs, and the caretakers of such a building are "engaged in production", because those employees who come in actual contact with the raw materials or finished goods are "engaged in production" and because the caretaker's work is "necessary" to their activities under Section 3(j) of the Act, and under the *Kirschbaum* case.

CASE B

Assume that the two classes of employees of the producing company described in Case A are housed in *two separate buildings,* the building housing the class of employees having no physical contact with the raw material or finished products being located either on the same plot as the factory, or across the street, or as in the case at bar, in a different city.

In this situation the Circuit Court of Appeals reasons that the question is narrowed from whether the *caretakers* are "engaged in the production of goods for commerce" to whether the *administrative agents and employees,* having no such physical contact, are themselves "engaged in the production of goods for commerce". The Court recognized that these words were words of colloquial speech having "fringes" of connotation and that interpretation may vary. It cautions against interpreting the phrase by using it as a starting point for a dialectical progression of step by step

examples because legislators concerned with ordinary affairs do not expect their words so to be used. It holds that the best way to reach the true meaning is to look at the underlying purpose of the Act and to try to project, upon the specific facts, how legislators, actuated by such a purpose would have dealt with it if it had been presented to them at the time of enactment of the Act. It reasons that the purpose of the Act included the caretakers in both Case A and Case B, and that the fact that administrative officials do not come in physical contact with the goods at any stage of their production could not have been thought relevant to the object to be obtained. It recognizes that the words of a statute contains no words of limitation, and that those who give the directions to employees having physical contact with the goods are as "necessary" to production within the meaning of Section 3(j) as those who do have such physical contact. It concludes by asserting that no vague compunction to extend the area of federal control should cause hesitation in giving the purpose of the statute its full scope, and that the realization of the object of the statute should not be truncated by irrelevant considerations.

Petitioners, at pages 15 to 19 of their brief, allege that the reasoning of the Circuit Court of Appeals in the case at bar is in conflict with the reasoning of this Court in the *Kirschbaum* case. It quotes at length from this Court's opinion in that case, particularly seizes upon the language "close and immediate tie" and "direct and immediate tie", and urges that the Circuit Court of Appeals failed to follow that test. Actually the Court below did wholeheartedly accept the *Kirschbaum* case as a starting point for its reasoning. By so doing it incorporated by reference all the reasoning in the *Kirschbaum* case and was not required to reiterate the specific language of that case.

Petitioner, at page 17, erroneously construes the *Kirschbaum* case as requiring that the activities of the service and maintenance employees must sustain such a close relation to "production" as to be "in reality a part thereof".

Such a construction is untenable, particularly after the *Walton* case, *supra*, where this Court reiterated its holding that making a building safe, clean and habitable for production was a sufficiently "close and immediate tie" with the process of production to bring an employee within the coverage of the Act. See also *Armour & Co.* v. *Wantock* (December, 1944), ... U. S. .....

On pages 18 and 19 of its brief, petitioner indulges in the dialectic reasoning which this Court specifically repudiated in the *Kirschbaum* case (at p. 526) when it quoted from *Santa Cruz* v. *Labor Board*, 303 U. S. 453, to the following effect:

> "And what is reasonably clear in a particular application is not to be overborne by the simple and familiar dialectic of suggesting doubtful and extreme cases."

POINT II

The decision of the Circuit Court of Appeals in the case at bar is not in conflict with the reasoning of various Circuit Courts of Appeal.

At pages 5 and 6 of its petition, and at pages 19-22 of its supporting brief petitioner asserts that the decision of the Circuit Court of Appeals in the case at bar is in conflict with the reasoning of the decisions in various cases decided by other Circuit Courts of Appeal.

We postpone for later discussion the *Rucker* case, *supra*.

As to the other cases listed by petitioner, we respectfully submit that no such conflict of reasoning exists.

The statute covers employees "engaged in interstate commerce", and employees "engaged in the production of goods for interstate commerce". This Court has held that the latter phrase is broader than the former and includes employees not covered by the former. *McLeod* v. *Threlkeld* (June, 1943), 319 U. S. 491.

Care must be taken to distinguish a line of cases which denies recovery to service and maintenance employees of

a building whose occupants are merely "engaged in interstate commerce" and not "engaged in the production of goods for commerce", in the building.

Stoike v. *First National Bank of the City of N. Y.* (Apr., 1943), 290 N. Y. 195 (certiorari denied);
Johnson v. *Dallas Downtown Development Co.* (C. C. A. 5) (Dec., 1942), 132 F. (2d) 287 (certiorari denied);
Cochran v. *Florida Nat. Bldg. Corp.* (C. C. A. 5) (Apr., 1943), 134 F. (2d) 615;
Tate v. *Empire Bldg. Corp.* (C. C. A. 6) (June, 1943), 135 F. (2d) 743 (certiorari denied);
Rosenberg v. *Semeria* (C. C. A. 9) (Aug., 1943), 137 F. (2) 742 (certiorari denied);
Lofther v. *First Natl. Bank of Chicago* (C. C. A. 7) (Oct., 1943), 138 F. (2d) 299;
Convey v. *Omaha Natl. Bank* (C. C. A. 8) (Dec., 1943), 140 F. (2d) 640 (certiorari denied);
Rucker v. *First Natl. Bank of Miami* (C. C. A. 10) (Oct., 1943), 138 F. (2d) 699 (certiorari denied);
Johnson v. *Masonic Bldg. Co.* (C. C. A. 5) (Nov., 1943), 138 F. (2d) 817 (certiorari denied);
Noonan v. *Fruco Construction Co.* (C. C. A. 8) (Dec., 1943), 140 F. (2d) 633;
Blumenthal v. *Girard Trust Co.* (C. C. A. 3) (Apr., 1944), 141 F. (2d) 849;
Building Service Internatl. Union v. *Trenton Trust Co.* (C. C. A. 3) (May, 1944), 142 F. (2d) 257.

The foregoing cases are the ones cited by petitioner as involving a conflict of reasoning with the decision in the case at bar. They are clearly distinguishable on the ground above mentioned and have no bearing on the instant case.

The petitioner attempts to show (pp. 19, 20) the relevancy of these cases by urging that building service employees in a category of buildings which it labels as "office

buildings" are not covered by the Act. It urges that these cases make no distinction between office buildings, based upon the varying and diversified activities in which tenants in "office buildings" are engaged. It mentions certain situations where service employees in office buildings have been held not to be covered by the Act. However, it omits to mention the situation involved in the case at bar, i.e., where the tenants are the executive and administrative personnel of producing companies whose activities in the building are such an important element in the process of production. In attempting to establish a category of "office buildings" the petitioner runs afoul of the language of the statute and of the reasoning of this Court in the *Kirschbaum* case, *supra*. In that case this Court warned that the phrase "engaged in the production of goods for commerce" cannot be construed by using abstract or rigid formulas or general propositions, that the Aet puts upon the courts the independent responsibility of applying *ad hoc* the general terms of the statute to an infinite variety of complicated industrial situations, and that the Court cannot escape an inquiry into the relationship of the particular employees to the production of goods for commerce. The petitioner's attempt to create a category of "office buildings" would wrongly stifle, at the threshhold, the inquiry concerning what activities were carried on by the occupants of the particular building involved.

At page 20 of its brief petitioner alleges that it believed that the foregoing cases construing the phrase "engaged in commerce" settled the law for all "office buildings". In this belief it was clearly in error, particularly after this Court decided *McLeod* v. *Threlkeld, supra*. It also urges that its belief was strengthened by the action of this Court in denying certiorari in those cases. This argument may also be quickly discarded, since this Court has repeatedly warned the members of the bar that a denial of a writ of certiorari imports no expression of opinion upon the merits of the case.

At pages 21-22, petitioner attacks the reasoning of the Circuit Court of Appeals in the case at bar as being novel, legislative, and in conflict with the requirement of a "close and immediate tie". We do not think there is any merit to these contentions. There is no novelty in using the purpose of a statute to get at its meaning. The judicial task was to decide this case, and the Court below, when it took a small step forward, performed only a proper judicial, and not a legislative, function. We have already shown that the Court below did incorporate by reference the reasoning in the *Kirschbaum* case, when it completely accepted the *Kirschbaum* case as the starting point for its decision.

At the bottom of page 19 and top of page 20 of its brief, petitioner alleges a conflict between the decision of the Court below in the case at bar and the reasoning of some District Courts, both in and out of the Second Circuit. We are not aware that a conflict between a Circuit Court of Appeals and a Federal District Court is an adequate reason for granting a writ of certiorari. (See Robertson, "Jurisdiction of the Supreme Court of the United States", pp. 576 et seq.)

In short, no such conflict of reasoning exists as would justify the granting of a writ of certiorari in the case at bar.

POINT III

The question of federal law which this Court is asked to settle should not be settled by this Court.

In Point III of its brief petitioner asserts that the Circuit Court of Appeals for the Second Circuit has decided an important question of federal law which has not been but should be settled by this Court. We respectfully submit that this contention is entirely without merit.

Petitioner asks this Court to settle the abstract question of whether building service employees who work in a hypo-

thetical category of buildings, which it describes as "office buildings", are covered by the Act. This request is a natural consequence of petitioner's failure to understand the significance of the line of cases interpreting the phrase "engaged in commerce". Apparently it rejects this Court's reasoning in the *Kirschbaum* case that each case must be decided on its own facts, and that categories and rigid formulas must be avoided.

At page 22 of its brief petitioner asserts that no goods were "produced" in the Borden Building. This assertion begs the very question involved in this case. We contended below that the brain power element in manufacture was just as much "production" as muscle power and machinery. The opinion of the Court below (R. 130) shows that that Court so held.

Petitioner does not ask this Court to settle the question of whether maintenance employees of office buildings whose occupants perform vital elements in the productive process are covered by the Act. Instead it asks this Court to settle the law for all "office buildings", regardless of the nature of the activities of their occupants. We submit that this Court should not and cannot properly decide such an abstract question.

It may be true that the law applicable to "office buildings" as a category is unsettled. However, we believe that no one case can settle it. The facts in each case must be carefully scrutinized to see whether the test of "engaged in the production of goods for commerce" is met. The case at bar did not add any uncertainty that was not already inherent in the task imposed by the statute upon the courts.

The possible retroactive liability of owners of office buildings (described on p. 7 of the Petition herein) should be a subject for legislative rather than judicial concern. Certainly this Court cannot be blamed for the misinterpretation placed upon its denial of certiorari in many cases, after the adequate warning it has given the bar.

POINT IV

The decision of the Circuit Court of Appeals in the case at bar is not in conflict with the decision of the Tenth Circuit in the case of *Rucker* v. *First National Bank of Miami, Okl.*, 138 F. (2d) 699.

In Point I of its brief (pp. 11-15) petitioner asserts that the decision of the Court below is avowedly in conflict with the decision of the Circuit Court of Appeals for the Tenth Circuit in the same matter in the *Rucker* case, *supra*. We respectfully submit that there is no merit to this contention.

The real difference in the views of the Second Circuit in the case at bar, and of the Tenth Circuit in the *Rucker* case, is on the question of whether "production" must be confined to actual contact with the raw material or finished goods. The Second Circuit said no. The Tenth Circuit assumed an affirmative answer without analyzing the problem. This explains its statement (at p. 702):

> "* * * it is not shown on this record whether any of the goods were produced in the building or that any of the employees transported to and from the offices are directly or indirectly engaged in the production of goods."

Ordinarily such language might be urged as a conclusive distinction between the *Rucker* case and the case at bar, for in the case at bar we have shown that there is "production", in the sense of the brain power element in production, in the Borden Building. But in view of the confusion as to the meaning of the word "production" we do not urge any such conclusive effect.

However, the Tenth Circuit in the *Rucker* case actually decided the case on a ground distinct from the question of whether "production" must be confined to actual physical contact with the goods. It really decided the case on a misinterpretation of the *Kirschbaum* case, *supra*. It indi-

cated that, even assuming that the occupants of the building were engaged in "production" within the meaning of the statute, building service and maintenance men who merely made the building safe, clean and habitable, without physically participating in the process of manufacture, did not have a sufficiently close "tie" to production. After first discussing whether or not there was "production" in the building, that Court said (p. 702):

> "*In any event,* the relationship is not shown to be 'close and immediate'." (Italics ours.)

This was the view which the Mississippi Supreme Court adopted in the *Walton* case, *supra*. After the Tenth Circuit decided the *Rucker* case, this Court reversed the *Walton* case. Such reversal of the *Walton* case was in effect a repudiation by this Court of the decision in the *Rucker* case.

We submit that a case actually involving a different point and repudiated as the *Rucker* case has been, should not be made the basis for granting a writ of certiorari because of an alleged conflict.

CONCLUSION

The decision below is correct. The essence of this case is whether physical contact with the raw material or finished goods on the part of the occupants of a building is essential to "production". The Court below held in the negative and we believe that decision is correct. We believe that the production process is basically composed of several elements, namely, brains, brawn, raw material and machinery. Each of these is a vital part of the process of production. Raw materials, machinery and brawn alone will not produce goods. There must also be the creative force of brain power, to determine when and how machinery and brawn should be applied to raw materials, and to determine when, where and how to acquire raw materials.

In the usual case, all these elements are located in the same geographical place. The instant case is entirely different. Because of modern scientific methods of communication, such as teletype, it has been possible geographically to separate a large part of the element of brain power in production from the other elements necessary to production. This separation has been particularly advantageous in the case of the Borden Company, where many factories are under unitary ownership. The geographical separation of brain power from the other elements has made it possible to concentrate a large part of the production brain power at one spot, and thus to derive maximum efficiency in production.

The conclusion is inescapable that the activities in the Borden Building being an important *element* in the production of the Borden products, constitute "production" in the Borden Building of such goods within the meaning of the Act. This conclusion is fortified by the language of the Act in Section 203(j) where Congress has stated that an employee engaging in any *"process necessary"* to the production of goods constitutes production of goods. This Court has held that an essential preliminary step in the production process constitutes "production".

Warren Bradshaw Drilling Co. v. *Hall* (Nov., 1942), 317 U. S. 88.

In that case oil drillers who drilled only to a specified depth short of oil were held to be engaged in the production of oil. This Court held that the drilling was a necessary part of the productive process to which it was intimately related. Moreover, this Court has already held that a *physical* process is not necessary to production.

Kirschbaum v. *Walling*, *supra*.

Viewed from the implications of our dual system of government, the case at bar is correctly decided. Congress has said that *intrastate* production destined for interstate com-

merce has a substantial effect on interstate commerce. As a consequence, Congress has forbidden substandard *intrastate* production. Certainly Congress also intended the Act to apply to cases, like the instant case, where the process of production is *interstate* and spread out over many states.

Viewed from the point of economic and social policy, the decision of the Court below is sound. One of the purposes of the Act is to spread employment.

Overnight Motor Transportation Co., Inc. v. *Missel* (1942), 316 U. S. 572.

The decision of the Court below contributes to the spreading of employment and thereby will aid in solving the post-war problem of providing jobs for returning war veterans.

There is no conflict warranting the granting of a writ of certiorari in the case at bar. The question of federal law which petitioner asks this Court to settle should not and cannot properly be settled by this Court. It is therefore respectfully submitted that the petition should be denied.

December, 1944.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 688

THE BORDEN COMPANY,

Petitioner,

against

JOSEPH BORELLA, CHARLES J. BURKE, WALTER CROSS, WILLIAM L. DEGRAAF, JOHN B. DONEGAN, STANLEY GAJDA, EDWARD GRAMCKO, STANLEY GRZECK, OLE HOFSETH, WILLIAM KAY, ALEXANDER KRUPICA, WILLIAM LENDO, THOMAS LO SASSO, ROBERT A. MARSHALL, WALTER C. MENYHART, JAMES MCCARTHY, MICHAEL NOVEMBER, LEONARD B. QUINN, ANDREW RUEB, THOMAS M. TREACY and JESUS ECHEVARRIA,

Respondents.

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BRIEF FOR RESPONDENTS

Opinions Below

The opinion of the District Court (R. 102-106) is reported in 52 F. Supp. 952.

The majority and dissenting opinions of the Circuit Court of Appeals, Second Circuit (R. 128-132) are reported in 145 F. (2d) 63.

Jurisdiction

Jurisdiction to review this case upon writ of certiorari is expressly conferred upon this Court by Judicial Code, Section 240, as amended (Act of March 3, 1891, c. 517, Sec.

6, 26 Stat. 828; Act of March 3, 1911, c. 231, Sec. 240, 36 Stat. 1157; Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938; U. S. C. Title 28, Sec. 347).

Judgment of the Circuit Court of Appeals for the Second Circuit which is sought to be reviewed was filed on August 18, 1944 (R. 133). The petition for a writ of certiorari was filed herein on November 16, 1944. The order of this Court granting certiorari was filed January 2, 1945 (R. 134).

Questions Presented

The primary question presented is whether the respondents were "engaged in the production of goods for commerce" within the meaning of the Fair Labor Standards Act of 1938 (52 Stat. 1060, June 25, 1938, 29 U. S. C. Secs. 201-219).

The answer to this primary question depends on the further question of whether the particular activities of the Borden Company in the Borden Building constituted "production" of goods for commerce within the meaning of said act.

The Statute Involved

The original statute, before being incorporated into the United States Code was the Act of June 25, 1938, c. 676, 52 Stat. 1060. The sections in the original Act were Sections 1 to 19, inclusive. In the Code, two hundred numbers were added to each section number, so that the section numbers in the Code run from 201 to 219, inclusive.

For purposes of brevity we shall, hereinafter, refer to the Fair Labor Standards Act of 1938 as the "Act", or the "statute".

Section 207—Maximum Hours:

"(a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

"(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

"(2) for a workweek longer than forty-two hours during the second year from such date, or

"(3) for a workweek longer than forty hours after the expiration of the second year from such date.

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

Section 203—Definitions:

"As used in sections 201-219 of this title—

• • • • • • •

"(b) 'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

• • • • • • •

"(i) 'Goods' means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles *or subjects* of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof." (Italics ours.)

"(j) 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or *in any process or occupation necessary to the production thereof*, in any State." (Italics ours.)

Section 216—Penalties; Civil and Criminal Liability:

"(b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

Criticism of Petitioner's Statement of Case

At pages 2 to 4 of its brief petitioner sets forth its "Statement of Case". There are several assertions therein to which we take exception.

In the second sentence in the third full paragraph on page 2, petitioner attempts to summarize the theory underlying the ruling of the Circuit Court of Appeals in the case at bar. Petitioner asserts that such theory was that "the respondents had no relationship or tie with the actual production of goods." As we shall later show, this assertion is plainly wrong.

Petitioner also asserts that such theory was based on the production by the Borden Company "in distant places" and not in the Borden Building. As we shall later show, this assertion is plainly wrong. The Court below held that the activities of the Borden Company in the Borden Building constituted "production of goods for commerce" within the meaning of the Act.

In the second full paragraph on page 3 petitioner asserts that the activities carried on by the Borden Company in

the Borden Building do not constitute "production". Such assertion begs the very question involved in the case at bar.

In the last paragraph on page 3 petitioner refers to finding of fact 9 (R. 118) which states that the petitioner "directs, supervises, manages and controls its entire business through the aforesaid directors, officers and employees", and in the third paragraph on page 4 petitioner asserts that the "Circuit Court of Appeals accepted and adopted the facts as found by the Trial Judge." It is true that the Circuit Court of Appeals did say: "The facts, which are not in dispute, are sufficiently stated in the findings of the trial judge." (R. 128). However, the adoption by the Circuit Court of Appeals of finding 9 should not be construed to mean that the Circuit Court of Appeals treated the case at bar as the case of an ordinary home office building having only a general remote supervision over the activities at its factories. The Circuit Court of Appeals had all the detailed facts before it, and stated in its opinion (R. 128,129):

> "The manufacturing all takes place in factories in the United States and Canada, which it owns and operates; but its executive and administrative activities —the supervision, management and control of the entire business—are all centered in an office building in New York, * * *. * * * This is the spot from which all directions go out as to what shall be bought, what shall be manufactured, where the products shall be distributed, etc."

The brief of the petitioner is wholly inadequate in failing to set forth the activities of the occupants of the Borden Building.

Summary Criticism of Petitioner's Argument

Petitioner has misconceived the issue in this case. It urges that the Court below erred in interpreting the word "necessary" in the Act, and gives a number of reasons, all

of which are without merit, why the word "necessary" should be given a restricted meaning sufficient to bar respondents from recovery. For a full criticism of petitioner's arguments see pages 34 to 40 herein. We think that the meaning of the word "necessary", as applied to service and maintenance men in a building, has been settled by this Court in its prior decisions. In our view, the real crux of this case is whether the activities of the Borden Company in the Borden Building constituted "production of goods for commerce" within the meaning of the Act.

Summary of Respondents' Argument

Respondents were engaged in the production of goods for commerce within the meaning of the Act. They are "necessary" to production because they contribute to continuity of production in the Borden Building by making the building safe, clean and habitable. The activities of the occupants of the Borden Building constituted "production of goods for commerce". "Production" means "handled" or "worked on". "Goods" has a two-fold meaning, viz., tangible objects such as cheese, etc., and the physical expression of intangible ideas. Under each of such meanings "goods" were "produced for commerce" in the Borden Building.

Respondents were also "engaged in interstate commerce" within the meaning of the Act.

Statement

This case involves the scope of the Fair Labor Standards Act of 1938 (U. S. Code, Title 29, Chap. 8, Secs. 201-219) in relation to a particular phase of industrial activity. Under Section 207(a) an employer must pay overtime compensation to any of his employees who is "engaged in commerce or in the production of goods for commerce". Section 203(j) provides that "for the purposes of this chapter

an employee shall be deemed to have been engaged in the production of goods if such employee was employed * * * in any process or occupation necessary to the production thereof * * *".

The employees here are engaged as service and maintenance men in a building in New York City called the Borden Building. The activities carried on in such building will be described in detail hereinbelow.

Section 216(b) makes an employer who violates the provisions of Section 207 liable to the employees affected in the amount of their unpaid overtime compensation and in an additional equal amount as liquidated damages, permits employees to maintain an action to recover such liability and directs the court in such action, in addition to any judgment awarded to the plaintiffs, to allow a reasonable attorney's fee to be paid by the defendant.

The precise question before the Court below was whether the Act extended to such service and maintenance employees in the Borden Building.

The Borden Company occupies seventeen floors, in whole or in part, of the Borden Building, located at 350 Madison Avenue, New York City, which has twenty-four floors, and which is owned by it. *From the offices in said building, an elaborate system of interstate production is controlled and given its operating force.* This particular system is such that without the activities carried on in its offices in the Borden Building, the Company's manufacturing plants located in various states in the country (R. 13) could not operate, any more than they could without their plant machinery or plant superintendents. These particular activities in the Borden Building constitute a vital element in the Borden Company's interstate production system. The details of the peculiar and unique manufacturing set-up of this Company are set forth hereinbelow.

This case presents facts clearly different from those present in the ordinary case of corporate home office supervision.

Nature of Respondents' Activities

The respondents are service and maintenance employees in the Borden Building, and are employed by the petitioner in connection with its operation and maintenance of said building. Some of the respondents are porters, some are watchmen, and others are elevator men (Finding 7, R. 118).

The respondents performed work ordinarily done by porters, watchmen and elevator men in such a building. The details of their work are set forth in the deposition of Marshall (R. 83-97). The porters clean lavatories, corridors, stairways and other places in the building, and have a few incidental duties, such as moving furniture, packing waste paper, distributing towels, etc. The night watchmen protect the building and its contents from fire and theft by making the rounds of the building and punching "Watchmen's keys" distributed in seventy-four stations throughout the building. They also require night visitors to the building to sign a register. The elevator men run the eight elevators in the building. The elevators are used by all the occupants of the building.

In short, the respondents contribute and are essential to making the Borden Building safe, clean and habitable for the use of its occupants.

The Building and Its Occupants

The building is a twenty-four story office building at No. 350 Madison Avenue in the City, County and State of New York, and is owned by the petitioner (Finding 6, R. 117). The total rentable area of the building is about 198,018 square feet (R. 101). During the period in question the Borden Company occupied 115,710 square feet (R. 101), which constitutes about 58% of the total rentable area. The space used by the Borden Company takes up in whole or in part approximately seventeen of the twenty-four floors, and the building is the home office of the company (Finding 8, R. 118). The remainder of said building not occupied by the Borden Company is occupied

pursuant to written agreements of lease by various persons, firms, partnerships, associations and corporations (Finding 17, R. 119), and none of said tenants produce, manufacture, handle, process or in any other manner work on any goods in said building (Finding 18, R. 120). We shall therefore limit our discussion to the activities of the Borden Company in the building.

Some General Facts About the Borden Company

The Company is a New Jersey corporation (Finding 1, R. 117). It is licensed to do business and is doing business in the State of New York and in the Southern District of New York (Finding 2, R. 117).

The Company is engaged in the business of processing, manufacturing, selling and distributing fluid, condensed, evaporated milk, casein, ice cream, butter, cheese and various other products (Finding 3, R. 117). It also manufactures various other products. During the period in question its gross sales exceeded $200,000,000 per year (R. 100). *It does business throughout the United States and in foreign countries* (Finding 4, R. 117). *The company owns and operates plants and factories in the United States and Canada* where it processes, manufactures, and from which it sells and distributes its products (Finding 5, R. 117; R. 13) across state lines.

The Activities of the Borden Company in the Borden Building

There are 822 employees of the Borden Company working in the Borden Building (R. 98). We shall analyze their activities in some detail, in most cases dealing only with large groups. We regret having to burden the Court with such detail, but it is unavoidable, since, in our view of the law, each case of this kind must be decided on its own facts, and the issues raised by this case cannot be properly analyzed without a scrutiny of the facts.

The Borden organization includes "General Departments", "Divisions", "Departments", "Bureaus", etc. There is a distinction between general departments relating to the company as a whole, and departments which are connected merely with divisions (R. 51-52).

The following is an organizational chart of the activities of the Borden Company in the Borden Building (the page numbers within the parentheses indicating the page numbers of this brief where the activities are discussed):

Board of Directors (11)
Executive Officers (11)
Manufacturing Department (13)
Purchasing Department (14)
General Accounting Department (15)
General Advertising Department (15)
Legal Department (16)
Income Tax Department (16)
Bureau of Insurance (16)
Public Relations Department (17)

The Various "Divisions" of the Company:

—Manufactured Products Division (17)
  —Sales Department (18)
  —Credit Department (19)
  —Cashier's Department (20)
  —Accounting Department (20)
  —Controller (20)
  —Disbursing (21)
  —Bank Reconciliation (21)
  —Cost Accounting (21)
  —Stock (22)
  —Sales Tabulation (22)
—Casein Division (22)
—National Milk Sugar Division (24)
—Special Products Division (24)
—Cheese Division (25)
—Ice Cream Operation (25)
—Fluid Milk Operation (25)

Departments Covering Several Divisions:
—Label Department (25)
—Export Department (26)
—Real Estate Department (26)
—Safety Bureau (27)
—Payroll Tabulation Department (27)
—Central Transcribing Bureau (27)
—Telephone and Switchboard (27)
—Traffic Department (28)
—Stationery Department (28)
—Mailing Department (29)
—Photostat and Photo-offset Department (29)
—Experimental Kitchen (30)

We shall now discuss the activities of these various groups of persons.

Board of Directors

The Board of Directors of the Borden Company consists of eleven members. They hold their meetings on the eleventh floor of the Borden Building. They guide the general policy of the Company (R. 63).

Executive Officers

The executive offices of the company are located on the eleventh floor of the Borden Building. The officers consist of a president (Mr. Montague), an executive vice-president (Mr. Waugh), several vice-presidents (Messrs. Ramsdell, Callan, Kieser, Jones, Comfort, Ross), a treasurer (Mr. Noetzel), a secretary (Mr. Rebman), an assistant treasurer and an assistant secretary (R. 61-68).

The president formulates policies for the operation of the company. He consults with the vice-presidents in charge of particular operations and issues instructions to them as to methods of running and operating the plants and factories. He does not issue instructions directly to the various plants and factories of the company (R. 61).

The executive vice-president is a liaison executive between the president and the other vice-presidents. He

works in cooperation with them and makes decisions, subject to the approval of the president, on the following subjects: accounting policy; expansion with respect to new buildings, new products and new affiliates; discontinuance of old factories, etc. (R. 62).

The vice-presidents (R. 62-66) are each in charge of specific operations of the company. In general they decide on new methods of production, new machinery for production, labor saving devices, etc. (R. 62-63). Mr. Ramsdell is in charge of the Sales Department of the Manufactured Products Division. Mr. Callan is in charge of the Casein Division and of the National Milk Sugar Division. Mr. Kieser is in charge of the Special Products Division. We shall discuss the activities of Messrs. Ramsdell, Callan and Kieser in greater detail hereinbelow. Mr. Jones is in charge of ice cream operations. Mr. Comfort is in charge of fluid milk operations. Dr. Ross is the economic analyst for the company. He forecasts business trends affecting inventories of stocks and raw materials, purchases; production and sales, and makes recommendations to vice-presidents in charge of specific operations concerning increases or decreases of supplies and inventories.

The treasurer (R. 66-67) controls the financial activities of the company. He supervises its cash position, negotiates and consummates loans for the company to be used for expansion of equipment and production in its plants and factories. He also supervises the Accounting Department, the Credit Department, the Bureau of Insurance and the Safety Bureau.

The secretary (R. 67) keeps all the corporate records, attends at and prepares minutes for directors' meetings, takes care of issuance of stock of subsidiary corporations, affixes the corporate seal and attests many documents which are thereafter sent across state lines.

The assistant secretary and assistant treasurer (R. 68) help the secretary and treasurer in the performance of their duties. The treasurer also has various subordinates to help him (R. 68).

The Manufacturing Department

This Department (R. 43-47) occupies the entire seventh floor of the building. It controls the superintendents of the various factories throughout the United States. It supervises the instructions for running the plants which manufacture all products of the Borden Company except casein and milk sugar. It receives advice daily from the various factories as to the pounds of milk received. If the supply of milk is inadequate for economical operation, this department will issue instructions to some other factory to divert their milk to the plant, or will change running instructions of the plant from either condensed to evaporated or some other manufactured product which the plant is qualified to run. It instructs the various factories as to when they should decrease production, and when they should change the form of production. It receives requests from superintendents of the individual plants and factories for instructions in connection with equipment, repairs, labor problems, purchase of trucks and automobiles. It determines new methods of manufacture and sends instructions to all the factories to use such new methods. It sends instructions throughout the United States. It controls the supply of raw materials for each plant. It controls the size, quantity and production of tin receptacles for Borden products, and is in charge of tin shops and machine shops where the Company makes tin cans. It appoints the top manufacturing personnel for the various plants. It receives audits from the individual factory superintendents as to their requirements, and sets up budgets for such factories. It approves the letting of contracts for various business matters that arise in connection with the operation of such plants. It makes contracts for the purchase of heavy plant expansion, issues orders for the construction of increased facilities, arranges the financing of plant expansion, and pays the bills for heavy equipment contracted for. Such intimate and instantaneous control of plant operations all over the United States from a building in New York City might almost seem to be im-

possible. It is true that this department does have two efficiency engineers who travel to and inspect the plants, and report to this department. It is also true that long distance telephone facilities are available (R. 26). But the real explanation is that this department has a *teletype machine with direct wires from the Borden Building to the various factories all over the nation* (R. 26). As Mr. Wyman admitted (R. 44) the manufacturing department in the Borden Building is the "*pulse* of the supply and demand condition of the individual factories and plants of the Borden Company, throughout the United States". The pulsations of the production ideas created and worked on in the Borden Building flow instantaneously over the teletype wires. The factories make products for shipment across state lines, and these products are sent across state lines as a result of the direction and control exercised by the manufacturing department in the Borden Building (R. 44). In effect, there is a regular system of interstate production.

Purchasing Department

The Purchasing Department (R. 69-71) occupies the entire thirteenth floor of the Borden Building and is in charge of Mr. Morse. The various factories communicate their needs to the vice-president in charge of each operation, and he advises the purchasing department of such needs. Representatives of this department also visit the factories to determine their requirements. This department purchases the needed supplies from visiting salesmen. It also negotiates and makes contracts for the purchase of the needed articles. It purchases substantially all the major supplies, machinery and raw materials needed by the plants and factories for the production of goods. Among the articles it purchases are sugar, coal, tinplate, labels, fibre boxes, wooden boxes, coffee, cleaning powder, heavy machinery, cocoa, malt, liquor, bottles, bottle caps, ice cream cartons, and barrels. These purchases cross state lines and are used to produce goods for shipment across state lines.

General Accounting Department

The General Accounting Department (R. 58-59, 66, 68) on the sixteenth floor is in charge of the general controller of the company, Mr. Camp. He supervises the general accounting procedure of the company, its affiliates and divisions. He prepares letters of instruction as to accounting procedure affecting operating units and sends such letters to regional accounting representatives of the company. He compiles statistics and consolidated financial statements of the Borden Company, its divisions and affiliates. He also compiles property records. The material prepared by him is photostated in the building and regularly sent across state lines, either directly from the building or from the office of agents of the company. The information contained in such photostats is for the use of the executives or the stockholders of the corporation.

General Advertising Department

The General Advertising Department, on the sixteenth floor (R. 76-77), is in charge of Mr. Peabody. It handles general and institutional advertising to build up good will for the company. Other advertising material is prepared by Mr. Ramsdell in the Sales Department in the Manufactured Products Division, on the fifth floor, and Messrs. Peabody and Ramsdell often work in conjunction, particularly in preparing customer's display material in connection with the basic Borden advertising "Elsie The Cow". Mr. Peabody and his assistants in the building create the ideas and reduce them to rough drafts. The final drafts are either prepared in the building, or prepared by an outside independent advertising agency and finally approved in the building. The final draft is then sent to an outside printer for proof. The proof is later approved by Mr. Peabody who then issues instructions to the printer to transmit the prints to the publications for insertion. The Borden Company inserts such good will advertising in national publications, such as Saturday Evening Post, Liberty and

Colliers (R. 34). The advertisements contemplate shipments across state lines from the company's factories and plants, wherever they may be situated (R. 28).

The General Advertising Department also handles the advertising for fluid milk (R. 64).

The Legal Department

The Legal Department (R. 36-37), on the fifth floor, is a part of the Borden Company, and its employees are employees of the company. It also has outside general counsel.

The Legal Department has three branches—general, handling general matters; workmen's compensation, handling all workmen's compensation cases for the company and its affiliates; and public liability.

The factories and plants of the company all over the country write in to this department for advice on such matters. The department prepares opinions with respect to national and state questions and sends the opinions across state lines over the whole nation.

The Income Tax Department

The Income Tax Department (R. 51-53) on the ninth floor prepares and files federal, state, dominion and provincial income tax returns for the Borden Company as a whole. The returns and the payments of taxes shown thereon are sent across state lines to the various tax collectors.

The Bureau of Insurance

The Bureau of Insurance (R. 77-78) on the sixteenth floor is under the direction of the treasurer (R. 66) and places all types of insurance for the Borden Company. In some instances, such as fire insurance for the factories and their contents, the Borden Company is a self-insurer and this Bureau deposits security in various states to comply with state laws. The Bureau insures raw products, purchased for factories, in outlying locations, and finished

products at various locations. It also places war risk insurance, and marine insurance for its Pacific fleet.

It also attempts to reduce insurance premium rates by installing safety devices at the factories of the company. For this purpose the Bureau has engineers who make surveys of the various plants and factories producing goods for interstate commerce and make recommendations for improvements in those factories. In this work it cooperates with the Safety Bureau on the fourteenth floor.

The Public Relations Department

The Public Relations Department (R. 73-74) on the fourteenth floor is under Mr. Fairman, as director of public relations for the company. This department has charge of public relations all over the country.

The "Divisions" of the Company

In addition to the above departments covering the company as a whole, there are several operating "Divisions" in the Borden Building which are related to specific production activities and which are divided into various departments. These departments of a division should not be confused with the departments of the company as a whole. We now discuss the various divisions and their departments. We shall later discuss departments which do work for several divisions, but which are not departments of the company as a whole.

The Manufactured Products Division

The Manufactured Products Division is located on several floors, and has charge of all manufactured products except casein and milk sugar (R. 43), which have their own Divisions.

The Manufactured Products Division has several departments and sub-departments. We have already discussed its Manufacturing Department.

The Sales Department

The Sales Department of the Manufactured Products Division (R. 27-32; 34-36), occupies all of the fourth floor and part of the fifth floor of the Borden Building. This department is headed by Mr. Ramsdell. It has charge of the sales promotion of all manufactured products of the Company, except casein and milk sugar (which have their own separate "Divisions"). The products it supervises have been given an organization name of "full line products" (R. 28). Among such products are condensed milk, evaporated milk, malted milk, Hemo, caramels and mincemeat (R. 27). It also promotes the sale of new products (R. 29).

Sales are promoted through the use of advertising and the use of district salesmen.

Mr. Ramsdell decides upon the type of campaign to be pursued (R. 29).

We shall first discuss promotion through advertising. Advertising is prepared for condensed milk, evaporated milk, malted milk, milk sugar and mincemeat (R. 27). Mr. Ramsdell works up the advertising expenditure budget (R. 28). The advertising ideas are created and reduced to rough layouts by Mr. Ramsdell and his staff (R. 27, 28, 29, 34). The layouts are then sent to independent advertising agencies (R. 28), then to commercial artists, then, at Mr. Ramsdell's instructions (R. 36), to the printer and finally are sent to the publication for insertion. The general advertising, under instructions from Mr. Ramsdell (R. 35), goes to national magazines and periodicals such as the Saturday Evening Post, Liberty and Colliers magazines (R. 34). The advertisements cross state lines and are distributed on a nationwide basis (R. 34). In addition Mr. Ramsdell and his staff create ideas and prepare layouts for brochures, window displays, window strips and counter displays to be used in groceries and super markets throughout the United States (R. 34). Such layouts go to an independent advertising agency, then to commercial artists, then to the printer. The prints are distributed across state

lines under Mr. Ramsdell's instructions. In some instances this department furnishes material to local store owners so that they may prepare and insert the ads in local newspapers, pay for them, and receive a credit from the Borden Company (R. 35). In district campaigns this department sent advertising material to the district office of the Company. All of such advertisements contemplate shipments across state lines from the various factories and plants (R. 28), to wholesalers all over the United States (R. 27).

Sales are also promoted by the use of a national sales organization (R. 29) consisting of district sales managers and salesmen. This department directs the activities of this sales organization (R. 27, 29). It supervises the number of salesmen in a given district, approves increases and decreases of the number of salesmen in a given district, and supervises and controls the district manager, who in turn controls the district salesmen. Local sales contemplate regular shipments of products across state lines (R. 30).

Orders resulting from such sales promotion are received by this department (R. 27), which prepares invoices and sends them to the various factories (R. 22, 27). The factories then make shipments to the customers across state lines (R. 28, 31, 32). The handling of cheese orders is slightly different (R. 32).

Credit Department

The Credit Department (R. 39-40) of the Manufactured Products Division is in charge of Mr. Cranch and occupies part of the sixth floor. It receives requests for reports on credit of prospective customers from the Sales Department and from Borden representatives and brokers all over the country. It keeps records of accounts receivable and consults other credit information in its office. It prepares credit reports in answer to such requests and forwards such reports across state lines all over the country. No sale on credit by the Borden Company can be made anywhere in the country unless approved by this department.

Cashier's Department

The Cashier's Department (R. 37-39) of the Manufactured Products Division occupies part of the sixth floor and is in charge of Mr. Turner. The bills sent to customers, in practically all cases, call for payment at the Borden Building. The customers of the Manufactured Products Division send checks, money orders and drafts to the Borden Building, and the payments find their way to this department. A great many of such payments are sent across state lines pursuant to sales made across state lines.

Accounting Department

The Accounting Department (R. 13-14; 45; 53-55) of the Manufactured Products Division occupies the eighth, ninth and part of the tenth floors of the building, and is in charge of Mr. Wyman who has the title of Controller.

The controller of this department supervises this entire department. His office issues all accounting instructions to various plants and factories of the defendant throughout the United States with respect to reporting to the home office at 350 Madison Avenue as to

(a) production figures, disbursements, receipts and shipment of goods from plants and factories,

(b) instructions pertaining to deductions of social security and state unemployment insurance, taxes and the proper method of so reporting on payroll records (R. 13).

The controller's office establishes and perfects financial statements with respect to the recording of sales, costs of sales, deductions, selling and administration expenses to arrive at net profits (R. 14). It supervises a staff of traveling auditors who visit each plant and factory for the purpose of internal control (R. 14). It supervises personnel matters in connection with factory and subsidiary employees (R. 14). The controller visits the defendant's

plants and factories from an administrative standpoint and establishes accounting procedure (R. 54-55). He directs, supervises and controls said plants and factories from an accounting view. He offers suggestions as to the increase and decrease of personnel, and sometimes employs personnel. He also instructs the superintendents of defendant's plants and factories as to methods of procedure developed at the home office for reports to the home office so that there is a systematic running of the Manufactured Products Division from the home office at 350 Madison Avenue (R. 55). Accounting reports prepared in the Borden Building are sent across state lines to plants outside of the state (R. 54). His department acts as a control system of all the plants and factories of this division throughout the country (R. 50).

There are five sub-departments of the Accounting Department of the Manufactured Products Division: Disbursing, Bank Reconciliation, Cost Accounting, Stock and Sales Tabulation. The disbursing sub-department (R. 49-50) is located on the eighth floor. It pays all bills and invoices. It pays brokers' commissions and makes payments on contracts. It also keeps track of and distributes factory disbursements. It checks to see whether factories have received purchases before paying the bills. It covers all the factories and plants of the Manufactured Products Division throughout the nation.

The Bank Reconciliation sub-department (R. 47-48) is located on the eighth floor. It covers the bank accounts of the plants all over the country. The local banks send duplicate bank statements to the superintendents of the various factories. The superintendent retains the duplicate but forwards the original bank statement and the vouchers to this sub-department which checks them for errors.

The Cost Accounting sub-department (R. 48-49) is located on the eighth floor of the building. It devises and applies methods of cost accounting to arrive at the individual factory cost of individual manufactured products.

The factories send in the figures of expenditures, and this sub-department collects and analyzes them. Its computations are sometimes used by the Manufactured Products Division as a basis for stopping production, increasing production, or changing the methods of production. The computations are also used by the General Accounting Department in preparing a profit and loss statement for the Borden Company. This sub-department also makes estimates of cost of production of proposed new products. It also does similar work for the Cheese Division (R. 48). It keeps records of raw materials and supplies (R. 51).

The Stock sub-department (R. 50-51) is located on the ninth floor of the building. Its records cover finished goods only. It works in conjunction with the Sales Tabulation sub-department. It keeps a perpetual running inventory of finished goods for every plant and factory. It receives semi-monthly and monthly reports of factory production all over the United States. It adds production and subtracts sales from the running inventory and arrives at an inventory at the end of the outlay. The inventory figures are turned over to the Cost sub-department for use in its computations.

The Sales Tabulation sub-department (R. 51) is located on the ninth floor. Its function is to tabulate all sales made to customers. Its computations are used by the Stock sub-department in computing the running inventory, and also to check Accounts Receivable from Sales.

We have completed our discussion of the Manufactured Products Division and now turn to the other divisions of the Company, to wit: Casein, National Milk Sugar, Special Products, Cheese, Ice Cream, and Fluid Milk.

The Casein Division

The Casein Division (R. 16-21) is on the second and third floors of the building. It handles the manufacture, sales promotion, and collections for casein products. It is in charge of Mr. Callan.

Casein is a plastic product made from skim milk powder. Casein is used to make a glue used in the manufacture of plywood and in the repair of household furniture. Casein is also used to make buttons, combs, hair brush backs, toothbrush holders and handles (R. 17).

The Casein Division has factories and sales offices at Bainbridge, New York, and Seattle, Washington. The main office, however, is in New York (R. 19).

The New York office purchases raw materials for the factories (R. 20) and sends them manufacturing instructions. It allocates orders from purchasers to the factories.

Sales of casein are promoted by advertising and by salesmen. The advertising copy is drafted in the building by Mr. Callan. The draft is sent to an independent advertising agency which writes the final copy. The advertising is placed from the building and is inserted in the Saturday Evening Post, Popular Mechanics, other national periodicals and trade publications. The advertising recommends the use of Casco cement or glue for various specific purposes and invites readers to communicate with the Casein Company in the Borden Building to get a sample. This Division also prepares special advertising circulars, booklets and brochures about casein and its uses, which are mailed out by the Mailing Department hereinafter discussed. Letters, in response to the advertisements, requesting samples, are received at the ~~home office in~~ the building. That office prepares order forms for samples in duplicate, listing the names of the prospective customers. The duplicate order forms for samples are sent to one of the two factories above described. The factory ships the sample to the prospective customer, usually by parcel post, and returns the original order to the Borden Building office with a notation that the samples have been shipped. Salesmen operate out of the Borden Building and the two branch sales offices to secure contracts to purchase casein products. The home office sends instructions regarding price policy to the branch sales offices.

This division passes on the credit standing of its new customers (R. 20).

After a factory ships goods to customers, it informs the home office which then sends out bills. Payments are made directly to the Borden Building (R. 23). The Seattle office however, sends out its own bills.

Shipments from the casein factories go across state lines (R. 21) and the casein products are distributed on a nation-wide basis (R. 20).

National Milk Sugar Division

The National Milk Sugar Division (R. 23) is on the third floor of the building, and is also in charge of Mr. Callan. It has factories at Penalville and Bainbridge, New York. These factories take the sugar out of skim milk, and make lactose which is used for feeding infants. The activities of this Division are similar to those of the Casein Division, except for differences arising out of dissimilarity of products.

This Division in the building issues instructions to the factories with respect to production, procedure, distribution and other matters. This home office takes care of advertising and receives orders as a result of advertising. Its customers are middlemen such as druggists. It sends instructions to the factories to ship products across state lines. The factories ship the goods, and advise the home office which sends bills to the customers. Customers send payment to the home office.

The Special Products Division

The Special Products Division (R. 74-76) is on the fifteenth floor of the building, and is in charge of Mr. Kieser. Its factories manufacture animal foods, live stock foods, poultry food, vitamins, flavors, concentrates, fish livers, fish meal and other fish products. It has charge of the manufacture and sales promotion and functions like the Casein Division. It purchases raw materials for the factories in

conjunction with the Purchasing Department. It supervises and directs the manufacturing operations of the plants. It has its own advertising staff which functions like that of the Casein Division. It has salesmen and all sales made by them are subject to this Division. It manufactures for shipment across state lines, and the manufactured products do cross state lines. It has a direct *teletype* wire to all plants and factories throughout the nation (R. 26).

The Cheese Division

The Cheese Division (R. 32) is under the control of Mr. Echburg, who is the general sales manager of the Division. He has a staff in the building. Its sales activities are the same as the Manufactured Products Division except that it has no separate advertising activities.

Ice Cream Operations

The Ice Cream Operations (R. 63-64) do not have a separate Division, but are in charge of Mr. Jones. The advertising originates in the building and the labels are approved by the Label Department, but very little else is done in the building in connection with ice cream operations.

Fluid Milk Operations

The Fluid Milk operations are in charge of Mr. Comfort. Very little is done in the building in connection with these operations except advertising and approval of labels.

Departments Covering Several Divisions

We now come to a consideration of the various departments covering several Divisions.

Label Department.

The Label Department (R. 40-41) is located on the sixth floor of the building, and is in charge of Mr. Thompson and

a committee. The labels used on the Company's products must conform to the Federal Pure Food and Drug Act.

The contents of the labels are created and prepared in the building by the various Divisions. The proposed labels are then sent to the Label Department (R. 64) which checks their size and contents. They are then sent to the Legal Department for an opinion as to their legality. If they do not comply with the law, this department makes the necessary corrections so far as ingredients are concerned. No label may be used without the prior approval of this department. After approval, the labels are sent to printers all over the country. The finished labels are sent to factories and plants of the Company all over the nation and cross state lines. The labels are affixed to the products at the factories, and the products cross state lines.

The Export Department

The Export Department (R. 33-34) is located on the fifth floor of the building. It handles sales promotion in foreign countries such as Panama, Venezuela, Peru, and the United Kingdom. It promotes sales of all Borden products through advertising and through foreign brokers.

The advertising is prepared and directed in the building. The foreign orders come directly to the building and reach this department. The export department then prepares invoices and sends instructions to the various plants and factories to make shipment. *It has a direct teletype wire to plants and factories throughout the nation* (R. 26). The customers generally make payment directly to the Borden Building. In a few situations which are complicated by sterling regulations the orders are routed to a Canadian subsidiary for shipment and billing.

Real Estate Department

The Real Estate Department (R. 80) is located on the twenty-first floor of the building and is in charge of Mr. Bowman. It has charge of all property of the Borden

Company. It negotiates the acquisition of real estate and leases for factories and plants all over the nation. It disposes of non-profitable property on orders from the proper source.

The Safety Bureau

The Safety Bureau (R. 71-72) is located on the fourteenth floor of the building and is in charge of Mr. Quesnel. It develops and supervises safety systems for the protection of production employees at the Company's plants and factories all over the nation. It sends safety instructions across state lines. It works in cooperation with the Bureau of Insurance above described.

The Payroll Tabulation Department

The Payroll Tabulation Department (R. 53) is located on the ninth floor of the building. It prepares semi-monthly payroll checks for the higher paid workers such as plant executives, throughout the nation, and mails such checks to such employees.

Central Transcribing Bureau

The Central Transcribing Bureau (R. 68-69) is located on the twelfth floor of the building. The employees of the Company in the various departments, who have no secretaries, dictate to ediphone machines, and the records are sent up to this bureau for transcription.

Telephone and Switchboard

The telephone and switchboard operators (R. 26) handle all incoming and outgoing telephone calls. Calls to factories all over the nation clear through this switchboard. However, there are separate teletype machines located in the Manufacturing Department, Export Department and Special Products Division which have direct wires to factories all over the nation.

General Traffic Department

The General Traffic Department (R. 23-26) is located on the third floor of the building and is in charge of Mr. Hadley. The interstate activities of the company are so great that he has a staff of fifteen employees. This department studies routes and freight rates to get the cheapest and speediest mode of shipment. Its activities cover shipments of malted milk, caramels, Hemo, casein, milk sugar, mincemeat, condensed milk, evaporated milk and prescription foods. All of the factories producing such articles are located outside of New York State except those making mincemeat and milk sugar. This department receives instructions from the Sales Department of the Manufactured Products Division. It issues standing instructions to the factories with respect to regular customers. In case of a new customer, it gives instructions to the factory shipping the goods as to how the shipments should go forward and which carrier shall receive the shipment. The routing is shown on an invoice sent the factory. If factories change to new products, it issues new shipping instructions. The factories are located throughout the nation, and the shipping instructions cross state lines.

Stationery Department

The Stationery Department (R. 72-73) is located on the fourteenth floor and is in charge of Mr. Strasser.

The stationery of the company is written and designed in the Borden Building. It is then sent to the printing shop of the Borden Company, which is also in charge of Mr. Strasser but which is apparently located in another building. The print shop prints up the stationery.

This department receives requests for stationery from and supplies practically all of the affiliates, divisions, plants and factories of the entire Borden Company. It issues instructions to the print shop to ship the stationery. The stationery is sent across state lines.

Mailing Department

The Mailing Department (R. 41-43) is located on the sixth floor of the building and is in charge of Mr. Van Valkenburgh.

It handles incoming mail which is distributed by messengers to the various branches of the company. It also handles the outgoing mail of practically all the departments in the building. The outgoing mail is collected by messengers. The outgoing mail is addressed to factories, brokers and customers of the Company.

It occasionally receives incoming commodities, such as defective packages or products, from the factories, which are sent to the home office for examination for defects. It occasionally handles outgoing commodities, such as samples and replacements.

It has a messenger service to collect and distribute mail and inter-office communications. The messengers travel throughout the building by elevator or stairs.

Photostat and Photo-Offset Department

The Photostat and Photo-Offset Department (R. 55-58; R. 59-61; R. 98-101) is located on the tenth floor of the building and is also in charge of Mr. Strasser. It has about six employees. Its photostat equipment consists of a photostat machine and a dryer (R. 60). Its photo-offset equipment consists of a camera, a machine for transferring the negative to a plate, a developer for the plate, a printing machine and a paper cutter.

This department makes photostats of financial statements, correspondence, cancelled checks, etc. The photostats are sent across state lines.

This department also makes photo-offsets. This process is part photography and part printing and can make quantities speedily. It is used to prepare letters of instructions to factories regarding accounting methods, report forms, OPA rules, WPB regulations and priorities. It also produces copies of accounting reports to be sent to factories.

It also reproduces financial statements. It receives orders for photo-offset work from plants and factories of the company all over the nation, and fills the orders from the building. It mails large quantities across state lines to the factories.

Experimental Kitchen

The Experimental Kitchen (R. 78-79) was located on the third floor during the period in question and was in charge of Miss Belmanno. She prepared booklets of recipes for housewives in which Borden products would be used. The booklets were sent to Borden customers. The recipes also were published in newspapers and periodicals.

This concludes the detailed discussion of the organization of the Borden Company and of the activities of the Borden Company in the Borden Building. *The picture is clearly presented of a regular system of interstate production of goods, with the personnel in the Borden Building controlling, and directing each and every phase of that production, and of a great creative organization formulating ideas for the operation of all branches of the company.* The question in this case briefly is whether those activities constitute "production of goods for commerce" within the meaning of the Act. We now direct our attention to that question.

ARGUMENT

Introduction

The cause of action herein is a statutory one. Section 216(b) provides that any employer who violates the provisions of Section 207 of the Act shall be liable to the employees affected in the amount of their unpaid overtime compensation and in an additional equal amount as liquidated damages, and that an action to recover such liability may be maintained in any court of competent jurisdiction

by any one or more employees. The right of employees to recover in such a cause of action depends squarely on whether the defendant is an employer who has violated the provisions of Section 207 of the Act. We are not here concerned with any violation of Section 206 of the Act.

Section 207(a) provides that no employer shall employ any of his employees *"who is engaged in commerce or in the production of goods for commerce"* for a workweek longer than specified hours unless such employee receives compensation for his employment in excess of the hours specified at a rate not less than one and one-half times the regular rate at which he is employed.

The defendant in its answer admitted that it had employed service and maintenance men for workweeks in excess of the hours specified in the statute, and that it did not pay such employees, for employment in excess of the hours specified, at a rate not less than one and one-half times the regular rate at which they were employed (R. 9). It follows, therefore, that the defendant had violated the provisions of Section 207(a) of the Act and plaintiffs are entitled to recover under Section 216(b) if such service and maintenance employees were *"engaged in commerce or in the production of goods for commerce"* within the meaning of the Act.

We contend that under the particular facts of this case, respondents were clearly *"engaged in the production of goods for commerce"*, within the meaning of the Act.

We also contend that under the facts of this case, respondents were *"engaged in commerce"*, within the statutory meaning of that phrase.

POINT I

Respondents were "engaged in the production of goods for commerce" within the meaning of the Act.

Respondents respectfully submit that they were "engaged in the production of goods for commerce" within the meaning of the Act.

We have already set forth (p. 8 of this brief) the nature of the activities of the respondents. They are maintenance men of the Borden Building, to wit: porters, watchmen and elevator operators. They contribute and are essential to making the Borden Building safe, clean and habitable, and thus contribute to the continuity of the activities of the occupants of the Borden Building.

A. Respondents' activities constituted production of goods for commerce, if the occupants of the Borden Building were engaged in production of goods for commerce, in the Borden Building, within the meaning of the Act.

In Section 203(j) of the Act, the following language appears:

> "* * * for the purposes of this Chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed * * * in any * * * occupation necessary to the production thereof * * *."

It is now well settled that, if the *occupants* of a building are engaged in the production of goods for commerce within the meaning of the Act, the service and maintenance men, who make the building safe, clean and habitable for the use of such occupants and thus contribute to continuity of production, are employed in an occupation "necessary" to the production of goods for commerce; and that such service and maintenance men are deemed to have been "engaged in the production of goods".

Kirschbaum v. *Walling* (June, 1942), 316 U. S. 517;
Walton v. *Southern Package Corporation* (Jan., 1944), 320 U. S. 540;
Armour & Co. v. *Wantock* (Dec., 1944), 323 U. S. 126.

The statute covers employees "engaged in interstate commerce", and employees "engaged in the production of goods for interstate commerce". This Court has held that the latter phrase is broader than the former and includes employees not covered by the former.

McLeod v. *Threlkeld* (June, 1943), 319 U. S. 491;
Armour & Co. v. *Wantock* (Dec., 1944), 323 U. S. 126.

Care must be taken to distinguish a line of cases which denies recovery to service and maintenance employees of a building whose occupants are merely "engaged in interstate commerce" and not "engaged in the production of goods for commerce", in the building.

Stoike v. *First National Bank of the City of N. Y.* (Apr., 1943), 290 N. Y. 195 (certiorari denied);
Johnson v. *Dallas Downtown Development Co.* (C. C. A. 5) (Dec., 1942), 132 F. (2d) 287 (certiorari denied);
Cochran v. *Florida Nat. Bldg. Corp.* (C. C. A. 5) (Apr., 1943), 134 F. (2d) 615;
Tate v. *Empire Bldg. Corp.* (C. C. A. 6) (June, 1943), 135 F. (2d) 743 (certiorari denied);
Rosenberg v. *Semeria* (C. C. A. 9) (Aug., 1943), 137 F. (2d) 742 (certiorari denied);
Lofther v. *First Natl. Bank of Chicago* (C. C. A. 7) (Oct., 1943), 138 F. (2d) 299;
Convey v. *Omaha Natl. Bank* (C. C. A. 8) (Dec., 1943), 140 F. (2d) 640 (certiorari denied);
Rucker v. *First Natl. Bank of Miami* (C. C. A. 10) (Oct., 1943), 138 F. (2d) 699 (certiorari denied);
Johnson v. *Masonic Bldg. Co.* (C. C. A. 5) (Nov., 1943), 138 F. (2d) 817 (certiorari denied);

Blumenthal v. *Girard Trust Co.* (C. C. A. 3) (Apr., 1944), 141 F. (2d) 849;
Building Service Internatl. Union v. *Trenton Trust Co.* (C. C. A. 3) (May, 1944), 142 F. (2d) 257.

Petitioner, in its brief, contends (pp. 7, 10) that the crux of the case at bar is the meaning of the word "necessary" as used in Section 3(j) of the Act. We disagree with this statement of the issues in this case. In our opinion the *Kirschbaum*, *Walton* and *Armour* cases, *supra*, effectively settle the meaning of the word "necessary" as applied to the facts of this case.

We believe that the real question for this Court to pass upon is whether the activities of the *occupants* of the Borden Building constitute "production of goods for commerce", within the meaning of the Act. We discuss this in full under Point I B. The brief for petitioner completely overlooks a discussion of the activities of such occupants, and assumes that there was no "production of goods for commerce" in the Borden Building by its occupants. Certainly the Court below regarded that question as the crux of this case. In its opinion (R. 130) it said:

> "The case may, therefore, be further narrowed to whether the administrative agents and employees of a producing company are themselves 'engaged * * * in the production of goods for commerce'."

And, in a later case, the Court below said, in referring to the case at bar:

> "And we have recognized that persons who comprise management as well as those physically engaged in the manufacture of goods are so engaged in production as defined by the Act as to bring the service employees of the office building in which they are located under the coverage of the Act. *Borella* v. *Borden*, 145 F. (2d) (C. C. A. 2)."

Calius v. *10 East Fortieth Street Bldg., Inc.* (Dec., 1944), 146 F. (2d) 438.

However, even though we regard the meaning of the word "necessary", as applied to service and maintenance employees, as being well settled by this Court, we shall direct our attention to some of the arguments as to the meaning of "necessary" offered in petitioner's brief.

Petitioner has vainly groped for some theory to overcome the effect of the *Kirschbaum, Walton* and *Armour* cases, and has advanced a number of arguments, all of which are without merit.

Petitioner starts out with the assumption that the Court below decided the case at bar on the theory that the petitioner was not "engaged in the production of goods for commerce" in the Borden Building but was so engaged "elsewhere" and "in distant places" (see petitioner's brief, pp. 2, 3, 7, 11, 14, 15, 18). This assumption is clearly wrong. The case below was decided squarely on the ground that the activities in the Borden Building of the occupants of the Borden Building constituted "production of goods for interstate commerce".

Petitioner next extracts certain language from the *Kirschbaum* case, *supra*, as a test in applying the word "necessary" to the case at bar (pp. 6-7). It seizes upon the words "close and immediate tie" and "essential part" (p. 6), and alleges that the Court below failed to apply such a test in the case at bar. We respectfully submit that there is no magic in these quoted words. Actually the Court below did wholeheartedly accept the *Kirschbaum* case as a starting point for its reasoning (R. 131). By so doing it incorporated by reference all the reasoning in the *Kirschbaum* case and was not required to reiterate the specific language of that case. Moreover, the process of extracting words from prior decisions of the Court, without reading them in the light of the facts of the case from which they are taken, has recently been disapproved by this Court with a strong caution to counsel.

Armour & Co. v. *Wantock*, 323 U. S. 126.

This Court, in writing its opinion on the meaning of the word "necessary" in the *Armour* case, *supra*, did not once mention the phrase "close and immediate tie". Petitioner's contention that the Court below in the case at bar was in error in failing to apply the alleged test is entirely without merit.

Petitioner next attempts to limit the application of the *Kirschbaum*, *Walton* and *Armour* cases to buildings where goods are "physically produced" and where the service and maintenance employees make "a clear and convincing evidentiary demonstration" of the existence of a "close and immediate tie" between their work and production (p. 6). We respectfully submit that both of these limitations are without merit. In Point I (B) of our brief we shall discuss our concept of the word "production" and show that the activities of the Borden Company in the Borden Building constituted "production of goods for commerce". Certainly the Court below in the case at bar refused to recognize any requirement that goods must be "physically produced" in the building, for in a later case, referring to the *Borden* case, it said:

> "That no physical contact with the goods is necessary we pointed out in the *Borella* case."
>
> *Callus* v. *10 East Fortieth Street Bldg. Inc.* (Dec. 1944), 146 F. (2d) 438.

Moreover, this Court has already held that a physical process is not necessary to "production".

> *Kirschbaum* v. *Walling*, *supra*.

The evidentiary demonstration alleged by petitioner to be required, finds no warrant in the decisions of this Court. In the case at bar we have shown that the respondents contribute to continuity of production in the building by making the building safe, clean and habitable. We believe that that is all we are required to show under the *Kirschbaum*, *Walton* and *Armour* cases, *supra*.

Petitioner next attacks the decision of the Court below as being legislative rather than judicial interpretation (pp. 7-8). It extracts certain language from the *Western Union* case as alleged support for its position. There is no merit in the attack, and the language extracted when replaced into its context does not support petitioner's contention. The Court below performed a proper judicial function and its decision is within the fair range of judicial interpretation. It interpreted the Act by recourse to the underlying purpose of the Act. The language extracted from the *Western Union* case is proper when read in connection with the facts of that case. There the legislative history of the Act, and a refusal by Congress to enact expressly the meaning contended for by the Government gave color to the words used. But the language quoted when taken out of its context does not state a rule of interpretation. If the language were taken literally there would never be room for judicial interpretation. In our opinion, the Fair Labor Standards Act is remedial legislation and should be broadly interpreted. This Court has laid down a liberal standard for interpretation, as follows:

> "But these provisions, like the other portions of the Fair Labor Standards Act, are remedial and humanitarian in purpose. We are not here dealing with mere chattels or articles of trade but with the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others. Those are the rights that Congress has specially legislated to protect. Such a statute must not be interpreted or applied in a narrow, grudging manner."
>
> *Tennessee Coal, Iron & R. R. Co.* v. *Muscoda Local No. 123, et al.* (1944), 321 U. S. 590.

Petitioner next attempts to place a limitation upon the meaning of the word "necessary" by referring to the implications of our dual system of government (pp. 8-10). Petitioner's argument is entirely without merit. Viewed from the implications of our dual system of government, the case at bar is correctly decided. Congress has said

that *intrastate* production destined for interstate commerce has a substantial effect on interstate commerce. As a consequence, Congress has forbidden substandard *intrastate* production. Certainly Congress also intended the Act to apply to cases, like the instant case, where the process of production is *interstate* and spread out over many states.

Petitioner attempts to interpret the word "necessary" by applying the standard of meaning of an ordinary man (pp. 10-11). It seems obvious that the judicial interpretation of that word by this Court with reference to building service and maintenance employees, should prevail over any standard of the ordinary man.

Moreover, the terms engaged "in the production of goods" or "in any * * * occupation necessary to the production" of goods are, in spite of petitioner's assertion to the contrary, highly technical terms involving legal knowledge and influenced by special statutory definitions. These terms should not be subject to the varying and inexperienced interpretations which would result from applying the standard of meaning of the "ordinary man".

At pages 11 and 12 of its brief, petitioner indulges in the dialectic reasoning which this Court specifically repudiated in the *Kirschbaum* case (at p. 526) when it quoted from *Santa Cruz* v. *Labor Board*, 303 U. S. 453, to the following effect:

> "And what is reasonably clear in a particular application is not to be overborne by the simple and familiar dialectic of suggesting doubtful and extreme cases."

At pages 12-13 of its brief, petitioner attempts to get some solace from the *Western Union* case, quotes certain language from that case dealing with the meaning of "handled" or "worked on", and concludes that the *respondents* are not engaged in production because they do not fit into the language quoted. Here petitioner's argument entirely misses the point. It is not necessary for building service and maintenance men to "handle" or "work on" goods in order to come within the coverage of the Act. It

is sufficient if they meet the tests laid down by the *Kirschbaum*, *Walton* and *Armour* cases, *supra*.

At various points in its brief petitioner attempts to establish a category of "office building" and alleges that service and maintenance men in such an "office building" are not covered by the Act (pp. 2, 3, 4, 11, 14, 15). There is no justification for such a category. In attempting to establish a category of "office buildings" the petitioner runs afoul of the language of the statute and of the reasoning of this Court in the *Kirschbaum* case, *supra*. In that case this Court warned that the phrase "engaged in the production of goods for commerce" cannot be construed by using abstract or rigid formulas or general propositions, that the Act puts upon the courts the independent responsibility of applying *ad hoc* the general terms of the statute to an infinite variety of complicated industrial situations, and that the Court cannot escape an inquiry into the relationship of the particular employees to the production of goods for commerce. The petitioner's attempt to create a category of "office buildings" would wrongly stifle, at the threshold, the inquiry concerning what activities were carried on by the occupants of the particular building involved.

At page 13 of its brief petitioner cites a number of cases which, it alleges, support its position. In this it is plainly wrong. All of the cases cited deal with maintenance men of buildings whose occupants were merely "engaged in commerce" and who were not "engaged in the production of goods" in the particular building involved. We have already pointed out the importance of this distinction (*supra*, p. 33). The fact that most of the cases cited by petitioner were decided after the decision by this Court in the *Kirschbaum* case is without any significance in view of the distinction between the statutory language involved.

At pages 14-18 of its brief petitioner discusses four cases. In all of them the tenants were *elsewhere* engaged in production. They have no bearing on the instant case where the activities of the occupants of the building *in the building* constituted "production of goods for commerce."

At page 19 of its brief, petitioner attempts to attribute some significance to the denial of certiorari by this Court in a number of cases. This argument may be quickly discarded, since this Court has repeatedly warned the members of the bar that a denial of a writ of certiorari imports no expression of opinion upon the merits of the case.

It is apparent, therefore, that the definition of the word "necessary" as settled by this Court in the *Kirschbaum*, *Walton* and *Armour* cases, *supra*, squarely covers the respondents if the activities of the occupants of the Borden Building in the Borden Building constituted "production of goods for commerce" within the meaning of the Act. We now direct our attention to that subject, which we regard as the crux of this case.

B. The occupants of the Borden Building were "engaged in the production of goods for commerce", in said building, within the meaning of the Act.

We submit that the occupants of the Borden Building were *"engaged in the production of goods for commerce"*, in said building, within the meaning of the Act, and that the Court below correctly so held.

What do the words "production" and "goods", as used in the Act, mean?

Congress did not provide a special statutory definition for the precise word *"production"*. However, it did provide a special meaning in Section 203(j) for the word *"produced"* which we believe controls the meaning of the noun "production". Section 203(j) contains the following definition for "produced":

> "'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State."

It is apparent that, in the special statutory definition, Congress incorporated the *colloquial* meanings of the words "produced", "handled" and "worked on".

The word "goods" has been given a statutory definition in Section 203(i) of the Act:

> "'Goods' means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, • • • ."

This *statutory* definition of "goods" uses the words "goods", "wares", "products", "commodities", "merchandise" and "articles of commerce". These words must be given their *colloquial* meaning. In such *colloquial* meaning the words referred to relate to *tangible* objects.

In addition, the definition includes the phrase "or *subjects of commerce of any character*". This Court has very recently held that the word "subjects" as used in this identical Section 203(i) includes the physical expression of intangible ideas.

Western Union Tel. Co. v. *Lenroot* (1945), ... U. S. ....., 89 L. Ed. 289.

In that case this Court said:

> "That 'ideas, wishes, orders and intelligence' are 'subjects' of the interstate commerce in which telegraph companies engage has also been held. • • • We think telegraphic messages are clearly 'subjects of commerce' and hence that they are 'goods' under this Act. • • • "

We interpret this language as broad enough to include not only telegraph messages but also other physical expressions of intangible ideas.

In determining whether the occupants of the Borden Building were "engaged in the production of goods" for commerce we must consider the meaning of the word

"goods" in both its colloquial aspect (tangible objects) and its special statutory meaning of "subjects of commerce" (physical expression of intangible ideas).

We maintain, that, under either meaning of the word, "goods" are "produced" for commerce in the Borden Building; within the meaning of the Act.

Let us first consider "goods" as tangible objects, such as milk, cream cheese, or any one of the other numerous products of the Borden Company. What constitutes "production" in the colloquial meaning of the word, of such goods? We believe that the production process is basically composed of several elements, namely, brains, brawn, raw material and machinery. Each of these is a vital part of the process of production. Raw materials, machinery and brawn alone will not produce goods. There must also be the creative force of brain power, to determine when and how machinery and brawn should be applied to raw materials, and to determine when, where and how to acquire raw materials. In the usual case, all these elements are located in the same geographical place. The instant case is entirely different. Because of modern scientific methods of communication, such as teletype, it has been possible geographically to separate a large part of the element of brain power in production from the other elements necessary to production. This separation has been particularly advantageous in the case of the Borden Company, where many factories are under unitary ownership. The geographical separation of brain power from the other elements has made it possible to concentrate a large part of the production brain power at one spot, and thus to derive maximum efficiency in production. We call the attention of the Court particularly to the activities of the following groups of persons in the Borden Building:

The Manufacturing Department of the Manufactured Goods Division (pp. 13-14 herein);

The Accounting Department of the Manufactured Goods Division (pp. 20-22 herein);

The Purchasing Department (p. 14 herein).

The Manufacturing Department has constant and instantaneous contact with the factories and determines what shall be produced, and when, and how. The Accounting Department of the Manufactured Products Division (as distinguished from the General Accounting Department) has charge of the detailed production records without which the production brain power cannot act intelligently. The sub-departments of the Accounting Department perform functions which in the usual case are performed at a factory. The physical separation of these functions from the factories and their transfer to the Borden Building cannot change their character as production activities. The Purchasing Department purchases substantially all the major supplies, machinery and raw materials needed by the plants and factories for the production of the Borden products.

The conclusion is inescapable that the activities in the Borden Building being an important *element* in the production of the Borden products, constitute "production" in the Borden Building of such goods within the meaning of the Act. This conclusion is fortified by the language of the Act in Section 203(j) where Congress has stated that an employee engaging in any *"process necessary"* to the production of goods constitutes production of goods. This Court has held that an essential preliminary step in the production process constitutes "production".

Warren Bradshaw Drilling Co. v. *Hall* (Nov., 1942), 317 U. S. 88.

In that case oil drillers who drilled only to a specified depth short of oil were held to be engaged in the production of oil. This Court held that the drilling was a necessary part of the productive process to which it was intimately related. Moreover, this Court has already held that a *physical* process is not necessary to production.

Kirschbaum v. *Walling, supra.*

In the *Western Union* case, *supra,* this Court, in discussing the meaning of "produce", "handle" and "work on", said:

> "• • • But the statute, while defining 'produced' to mean 'handled' or 'worked on' has not defined 'handled' or 'worked on'. These are terms of ordinary speech and mean what they mean in ordinary intercourse in this context. They serve a useful purpose when read to relate to all steps, whether manufacture or not, which lead to readiness for putting goods into the stream of commerce. One who packages a product, or bottles a liquid, or labels, or performs any number of tasks incidental to preparing for shipment might otherwise escape the Act, for in a sense he neither manufactures, produces, or mines the goods. *We are clear that 'handled' or 'worked on' includes every kind of incidental operation preparatory to putting goods into the stream of commerce.*" (Italics supplied.)

Certainly, the activities of the Borden Company in the Borden Building were operations preparatory to putting the tangible goods into the stream of commerce and therefore constituted "production" of such "goods".

Next let us consider "goods" in its meaning as the physical expression of an intangible idea. In the *Western Union Company* case, as we have already seen, this Court held that a telegraph message was "goods" and that "handling" or "working on" the "goods" constituted "producing" the "goods". The exact limits of this doctrine have not yet been defined, but whatever its ultimate limits, we assert that it should be applied to the facts of this case. When so applied there clearly is "production" of "goods" for commerce, in the Borden Building. The instant case meets the test laid down by the majority opinion in the *Western Union* case because here the ideas themselves are *created* in the Borden Building, while the telegraph company merely handled and worked on ideas produced by the sender of the message. The record in our case is replete with instances where ideas of all kinds are created in the building, reduced to physical expression in the building, worked on in the building, and transmitted and communi-

cated across state lines. To state all of the examples would require reiteration of large parts of the activities of the Borden Company. We here merely call the attention of the Court to a few instances:

The advertising ideas created by the General Advertising Department;

The legal opinions written by the Legal Department;

The production ideas created by the Manufacturing Department;

The advertising ideas created by the Sales Department of the Manufactured Products Division;

The Credit Reports created by the Credit Department;

The accounting ideas created by the Accounting Department of the Manufactured Products Division;

The production and advertising ideas created by the Casein Division, the National Milk Sugar Division, and the Special Products Division;

The purchasing ideas created in the Purchasing Department;

The ideas for labels created and prepared in the building and checked over by the Label Department and the Legal Department;

The advertising and other sales promotion ideas created by the Export Department;

The safety ideas created by the Safety Bureau;

The traffic ideas created in the Traffic Department;

The operations of the Photostat and Photo-Offset Department in changing the physical form of expression of the ideas;

The operations of the teletype system in the Manufacturing, Export and Special Products Division in changing the physical form of the expression of the ideas.

It is clear that important ideas are created and worked on in the building and transmitted across state lines. This Court should hold that the doctrine of the *Western Union*

case applies to the instant case, and that there is "production of goods for commerce" by the Borden Company in the Borden Building.

POINT II

Respondents were "engaged in interstate commerce" within the meaning of the act.

We believe that the respondents in this case were also "engaged in interstate commerce" within the meaning of the Act. Concededly, the Borden Building is the center of a tremendous amount of interstate activity. Certainly the elevators in the building are indispensable to the conduct of interstate commerce by the Borden Company there. The porters who clean the quarters where the occupants carry on interstate commerce (R. 83-86), and the watchmen who safeguard the premises and the property of the occupants, are also so closely connected with operations in interstate commerce as to be a part thereof.

The defendant is engaged in interstate commerce at the Borden Building (R. 120) to such an extent that the activities in the Borden Building make that building an *instrumentality* of interstate commerce in the same manner that a bridge in interstate commerce is an instrumentality thereof. It has been held that employees engaged in maintaining instrumentalities of interstate commerce are covered by the Act.

Overstreet v. *North Shore Corp.* (Feb., 1943), 318 U. S. 125 (drawbridge).

The respondents herein are therefore "engaged in interstate commerce".

Certainly it is possible for maintenance men in a building to be so closely connected with the operations of interstate commerce that the maintenance men may be said to be "engaged in interstate commerce". Each case must be decided on its own facts.

Burton v. *Zimmerman* (1942), 131 F. (2d) 377.

CONCLUSION

The testimony in this case establishes that the various plants of the Borden Company throughout the country are parts of one vast national production system, of which another essential part is physically housed in and functions at the Borden Building. Here we have what we respectfully submit is the unusual situation: a complex interstate production system, the operation of which depends upon operations in the Borden Building. From this building, the Company's far-flung activities are not merely generally supervised, but are actually controlled in minute detail. These activities, centralized in the Borden Building, are part of, control and motivate production and manufacture in plants throughout the country, as well as all other activities of the Company.

If the activities now being carried on at the Borden Building were to be discontinued, the necessary flow of production activities would abruptly halt and the Company's interstate production system would collapse, in the same cause and effect relationship as if labor at the plants ceased working or if the machinery at the plants were suddenly dismantled or destroyed.

The decision below is correct. The essence of this case is whether physical contact with the raw material or finished goods on the part of the occupants of a building is essential to "production". The Court below held in the negative and we believe that decision is correct.

Viewed from the point of economic and social policy, the decision of the Court below is sound. One of the purposes of the Act is to spread employment.

Overnight Motor Transportation Co., Inc. v. *Missel* (1942), 316 U. S. 572.

The decision of the Court below contributes to the spreading of employment and thereby will aid in solving the post-war problem of providing jobs for returning war veterans.

The judgment in favor of respondents should be affirmed.

Respectfully submitted,

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March , 1945.

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 688

THE BORDEN COMPANY, PETITIONER

v.

JOSEPH BORELLA, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the district court (R. 102–106) is reported in 52 F. Supp. 952. The majority and dissenting opinions in the circuit court of appeals (R. 128–132) are reported in 145 F. 2d 63.

JURISDICTION

The judgment of the circuit court of appeals was entered on August 18, 1944 (R. 133). The petition for a writ of certiorari was filed on November 16, 1944, and was granted on January 2, 1945 (R. 134). The jurisdiction of this Court

rests on section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Respondents are the maintenance employees in a building used primarily as the headquarters of a large manufacturing enterprise, engaged in the manufacture of milk products and other food products in numerous factories located throughout the United States and in foreign countries. These factories are engaged in the manufacture of products for interstate commerce. Petitioner's entire business, including the detailed direction of its many factories, is supervised, managed and controlled by the executive, administrative, clerical and other employees working in the headquarters building. The question is whether the maintenance employees in this building are engaged "in any process or occupation necessary to the production" of goods for commerce within the meaning of the Fair Labor Standards Act.

STATUTORY PROVISIONS INVOLVED

Section 7 of the Act (c. 676, 52 Stat. 1060, 29 U. S. C., sec. 201 et seq.) requires payment of overtime compensation to employees "engaged in commerce or in the production of goods for commerce." Section 3 (j) of the Act defines "produced" and "production of goods" as follows:

> SEC. 3 (j) "Produced" means produced, manufactured, mined, handled, or in any

other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

STATEMENT

Since respondents' brief contains (pp. 6–30) a detailed and comprehensive account of the activities carried on in the building, we are limiting our statement to a summary of the evidence which seems to us most significant.

Respondents are elevator operators, porters, and night watchmen in a 24-story building at 350 Madison Avenue, in New York City, which houses and is used primarily as petitioner's central office. This building, known as the Borden Building, is owned and operated by petitioner (R. 8). Although some of the space in the building is leased to other tenants, the building is devoted primarilly to the Borden Company's business. Approximately 17 of the 24 floors in whole or in part, and 58% of the total rentable area, are occupied by petitioner (R. 118), which has over 800 of its employees in the building (R. 98). Petitioner is a New Jersey corporation engaged in the business of manufacturing milk products and other food

products[1] "throughout the United States and in foreign countries" (R. 117). It has factories all over the United States and in Canada (*ibid.*), and during the period involved in this suit did a business of well over $200,000,000 annually (R. 100).[2] The factories are admittedly engaged in the production of goods for interstate commerce (R. 43–44). The building here involved is used as headquarters for directing and controlling the manufacture of all the Borden products.

As shown by the recital below, not only are the operations of the various factories coordinated at this central office, but the actual manufacturing processes in the individual plants are directed in the minutest detail from this building. Every step of the manufacturing processes in the various factories is dictated or controlled by employees at these headquarters. The purchase of raw materials and supplies, the methods of production, the amounts to be produced, the quantity and character of the labor used, the safety measures, the budgeting and financing, labor problems, and the maintenance of the plants and equipment, are all directed from this building.

[1] Included among the manufactured products are casein, milk sugar, condensed and evaporated milk, cheese and cheese products, vitamin concentrates, poultry and animal foods, dehydrated soups and powdered coffee (R. 46, 43, 24). Petitioner also manufactures tin cans for its products (R. 46).

[2] The 1943 sales amounted to over $370,000,000, and the 1944 sales record was over $410,000,000. *The New York Times*, March 16, 1945, p. 25.

"Running instructions" concerning every aspect of production are issued by the Manufacturing Department in the Borden Building in New York to the factories located throughout the country (R. 43–44). This department controls the supply of raw materials for each plant, determines increases and decreases in production, and initiates and directs changes in the method of manufacture (R. 43–44, 47). Problems arising with respect to labor, repairs, plant expansion, and purchase of plant equipment must be referred to New York (R. 44–45). The Manufacturing Department employs the head manufacturing personnel for the various factories, draws up the plant budgets, arranges for the financing and construction of increased plant facilities, and sends out engineers to inspect the plants and report on their efficiency (R. 45–46). Plant superintendents have discretion only in the conduct of routine business; "they are entirely controlled by the manufacturing department" (R. 43). This close and detailed supervision is fostered by a system of constant communication between the central office and the factories throughout the country. Direct wires through teletype machines located on three floors of the Borden Building run to petitioner's various factories all over the nation, thus assuring immediate communication between the central office and the branch plants (R. 26).

Other central departments vital to the manufacturing process in all the factories are likewise

located in the Borden Building. Substantially all the raw materials, supplies, and machinery required by the Borden factories for the production of goods are purchased through the head office (R. 69–70). The Central Purchasing Department determines factory requirements and negotiates contracts for the purchase of needed commodities such as coal, machinery, sugar, cocoa, coffee, cleaning powder, malt, liquor, tinplate, labels, ice cream cartons, boxes, caps, barrels, and bottles (R. 70). Priorities and allocation of materials among the various factories are determined by the Priorities Division in the home office (R. 54). Direction of safety measures for all of petitioner's factories is similarly coordinated by the Safety Bureau in New York, which is responsible for investigating safety methods and devices and issuing instructions to the plants (R. 71–72). Legal problems, labor and union problems, insurance requirements, income tax reports, and questions relating to the leasing and purchase of real estate are likewise handled on a nation-wide basis by the central office (R. 36–37, 54, 77, 51–52, 80).

By means of the system of accounting controls operated by its employees in this building petitioner maintains detailed and complete reports of inventories, volume and cost of production, and tax records for each of the factories (R. 13–14, 48). The control exercised by the headquarters office over each plant's financial operations is so complete that the accounting department in this build-

ing is informed of every petty cash payment made by a factory. (R. 47–48). The accounting division issues "all accounting instructions to the various factories", including instructions as to "production figures, disbursements, receipts, and the issuance of factory shipped goods through the medium of invoices" (R. 13). An additional type of supervision is provided by a staff of traveling auditors who "visit each factory for the purpose of internal control" (R. 14).

In addition to the Manufacturing Department, which entirely controls the production of all "manufactured products" except casein and milk sugar (R. 43), and which sends "running instructions" to the various factories regarding the manufacture of such products, there is a Special Products Division (R. 74–75), a Casein Division (R. 15–21), and a National Milk Sugar Department (R. 23). With respect to casein products the Casein Division purchases the raw materials for the factories (R. 20), issues "manufacturing instructions" to the factories (R. 20), establishes their price policy (R. 19), prepares all the advertising, and arranges for the sending of samples from the factories to prospective customers (R. 18). Similar functions are performed by the National Milk Sugar Division with respect to milk sugar products. As in the case of the Casein Division, "the factories are instructed from this office as to production, procedure, distribution,

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and other matters" (R. 23). Comparable functions are performed by the Special Products Division for the factories manufacturing animal foods, livestock foods, poultry foods, vitamins, flavors, and concentrates (R. 74–75).

Finally, a considerable amount of "goods" or "articles or subjects of commerce" is produced in the Borden Building itself. The Photostat Division makes photostatic copies of financial statements and various other papers which are sent out to the various branch offices (R. 55–56). Photo offset work is also done in the building—a process which is "part photography and part printing" (R. 57). By this process are produced copies of financial statements, instructions to plants and factories, copies of various Government rules and regulations, and printed forms to be used for the reports of branch offices. All these articles are then sent to the various branch offices. A Label Department in the building passes on all the labels used on Borden Company products (R. 40–41). Although the printing of the labels is done by independent printers, many of the sample labels are designed and prepared in the Borden Building (*ibid.*). Much of the advertising work is also done in this building. "The original ideas for the advertising are commonly created in this building by men working in this building" (R. 76). Drafts of advertisements are frequently prepared in the building, and "the advertisement in final form is always approved in this building" (*ibid.*). In the

experimental kitchen "experimenting with recipes for our products" is carried on (R. 78). The recipes resulting from these experiments are then made up in booklet form, and sent out to the trade over the country (*ibid.*). In the experimental laboratory, experiments for the manufacture of new food products are made and instructions and samples are then sent to the various factories for production in larger amounts (R. 79).

The district court found that petitioner "does business throughout the United States and in foreign countries" (Fdg. 4, R. 117), and that it "directs, supervises, manages and controls its entire business through the * * * directors, officers and employees" working in the Borden Building (Fdg. 10, R. 118). It ruled, however, that the "actual production of goods for commerce is carried on" elsewhere than in the Borden Building, and that there was no production of such goods in the building (R. 104); that the preparation and drafting of labels, photostats, and advertising material did not constitute "production of goods" within the meaning of the Act (R. 103); and that the case was controlled by *McLeod* v. *Threlkeld*, 319 U. S. 491, and *Stoike* v. *First National Bank*, 290 N. Y. 195 (1943), certiorari denied, 320 U. S. 762, rather than by *Kirschbaum Co.* v. *Walling*, 316 U. S. 517.

The circuit court of appeals, reversing the district court, held that respondents were engaged

in processes or occupations necessary to the production of the Borden products regardless of "the circumstance that administrative officials do not come in physical contact with the goods at any stage of their production" (R. 131). The court reasoned that those "who direct the whole conduct of an industry" are engaged in "production" as clearly as are the artisans in the factory or the dispatching clerks on the shipping platforms, and that therefore there appeared "no reason that could have induced Congress, having included employees who made tenantable the quarters of artisans and shipping clerks, to exclude those who made tenantable the quarters of the president, the managers, the cashiers, superintendents and the rest" (R. 131, 132).. The court expressed no opinion on the contention that physical production of goods was carried on in the building by reason of the preparation, drafting and handling of labels, photostats, advertising and other materials.[3]

SUMMARY OF ARGUMENT

A. Affirmance of the judgment may properly be rested on the ground assigned by the court below. *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, is authority for the conclusion that maintenance

[3] In *10 East 40th Street Building, Inc.*, v. *Callus, et al.*, this Term, No. 820, the companion case here, the Second Circuit Court of Appeals did hold that the designing and preparation of advertising material, and lithographed and printed matter by publicity concerns, constituted "production of goods" within the meaning of the Act.

employees of an office building are engaged "in the production of goods" within the meaning of the Fair Labor Standards Act when the tenants of the building conduct in the building the physical processes of the manufacture of goods. Nothing in that opinion, however, suggests that the term "production of goods" is limited in application to the physical processes of manufacture. Here, factually, the management processes performed in the building by its principal occupant are as integral and vital a part of the "production" of petitioner's goods as are the physical processes of manufacture performed elsewhere. Every significant operation of manufacture by an immense business organization producing goods throughout the United States and abroad is initiated, supervised and directed from this building. The control is not general, it is detailed and meticulous. The superintendents of the individual factories exercise practically no judgment of their own, but "are entirely controlled by the manufacturing department" located in this building. A realistic understanding of the facts of industrial organization leads to the conclusion that the operations conducted in this building are themselves "production" in every significant sense, rather than, as petitioner would have them, "once removed" from production. Since it is unquestionable that the services of the maintenance employees here involved are as "necessary to" the operations of the Borden Company in this

building as were the services of the maintenance employees to the operations of the manufacturing tenants in the *Kirschbaum* case, the decision should be the same in both cases.

B. Although the court below did not find it necessary to consider the fact that apart from its management operations petitioner also engages in substantial physical production of goods in the building, the record establishes that to be the case. Petitioner's employees in the building engage regularly in drafting, writing, photostating, mimeographing, assembling, packaging, and shipping such materials as labels, photostats, reports, advertising copy, and other matter falling within the statutory definition of "goods." We believe that the operations of these employees constitute the "production of goods" within the meaning of the Act, even in the physical sense to which petitioner would limit the phrase; and therefore we believe that the judgment below might properly be affirmed on this ground also.

ARGUMENT

RESPONDENTS ARE ENGAGED IN OCCUPATIONS "NECESSARY TO THE PRODUCTION" OF GOODS FOR COMMERCE WITHIN THE MEANING OF THE FAIR LABOR STANDARDS ACT

The court below was correct, we believe, in holding that respondents are engaged in occupations necessary to the production of petitioner's milk products and food products. The holding was based on the court's conclusion that respondents'

occupations were "necessary" to petitioner's management operations conducted in the Borden Building, and that these management operations themselves constituted as essential a part of the production as the physical operations of manufacture involved in *Kirschbaum Co.* v. *Walling*, 316 U. S. 517. It is our view that this ground is of itself sufficient to justify the holding that respondents are within the coverage of the Act, and that it is accordingly unnecessary to consider any other basis of coverage. Nevertheless, we believe that the decision of the court below might also be affirmed on the ground that there is substantial physical production of goods for commerce in the Borden Building, in that labels, photostats and other such materials are drafted, handled and otherwise physically worked on in the building.

A. *Respondents' duties are necessary to the production of petitioner's milk products and food products*

That maintenance employees, such as respondents, are covered by the Act when goods are physically processed and handled in the building which they maintain has been settled by *Kirschbaum Co.* v. *Walling*, 316 U. S. 517. The question presented here is whether a distinction should be drawn between employees who maintain a building in which the physical processes of manufacturing are carried on and employees who maintain a building in which no physical manufacturing is

carried on but from which the whole course of production is directed, supervised and controlled in every detail.

The activities carried on in the building involved here are as integral a part of the production of the finished milk products and food products as are the manufacturing processes physically conducted elsewhere. The work of the employees (including respondents) in the Borden Building is "part of an integrated effort for the production of goods" (see *Armour & Co.* v. *Wantock*, 323 U. S. 126 at 130). We submit that "practical considerations" pertaining to the particular course of business here involved,[4] as well as "larger considerations of national policy, legislative history, and administrative practicalities" (*Kirschbaum Co.* v. *Walling*, 316 U. S. at 523), support the conclusion that respondents are necessary to such production within the meaning of the Act.

The Borden Company maintains and operates its building in New York for the purposes of its business of making and selling Borden products.[5]

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[4] See *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, and *Overstreet* v. *North Shore Corp.*, 318 U. S. 125, 128.

[5] The leasing of space to other tenants in the Borden Building is purely incidental to the main purpose and use of the building. In this significant respect, the instant case is different from the companion case *10 East 40th Street Building, Inc.*, v. *Callus, et al.*, this Term, No. 820. A separate brief *amicus* is being filed on behalf of the Administrator in the latter case. The cases are comparable in many essential aspects, and we believe that the maintenance employees in

The activities carried on by employees in the building are all directed to the production of goods for commerce. The key officials in the actual manufacturing processes are located and perform their functions in the building. Although geographically removed from the manufacturing plants, they direct, supervise, and control, immediately and in detail, each step of the manufacturing processes in the individual factories. The communication system, consisting of direct teletype wires, a constant and continuous stream of reports back and forth, and traveling auditors, engineers, and other representatives, insures the closest possible tie between the activities at headquarters and the manufacturing processes at the factories.

This functional integration is strengthened and sustained by petitioner's hierarchical system of management, whereby every substantial decision or action to be taken at any branch plant must emanate from, or be approved by, the key employees in the home office. Every action in an individual factory must be coordinated, through the home office, with the operations in the other factories. The Controller of petitioner's Manufacturing Department testified that that Department,

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the *Callus* case are likewise within the coverage of the Act. However, the situation involved in the *Callus case*, where the building is occupied by a variety of tenants engaged in many different businesses and where the building as a whole is not integrated with the business of any one tenant engaged in the production of goods for commerce, obviously presents a more complex problem.

located in the building, is the "pulse" of the supply and demand condition of the individual factories throughout the United States (R. 44). He testified also that the superintendents of the individual factories exercise practically no judgment of their own, but "are entirely controlled by the manufacturing department" (R. 43). The evidence indisputably shows that the manufacturing processes at the various factories are wholly dependent upon the activities of the employees at the main office. The employees at the home office determine what raw materials shall be delivered to the factories, the quantity and character of their production, the manner in which the plants shall operate, what equipment shall be installed in the plants, how labor and personnel problems shall be dealt with; in other words, they handle practically every detail of the manufacturing processes except the physical making of the products.

It is generally recognized in the industrial world that such management, control and clerical activities are as much a part of the manufacturing process as the manual operations performed at the work bench or machine. The Census of Manufactures, for example, includes under the classification "manufacturing employees" "(1) managers, superintendents, and other supervisory employees, and responsible professional and technical employees; (2) clerks, stenographers, and other clerical employees; and (3) wage earners" (the latter including "those who perform manual

work, using tools, operating machines, handling materials and products, and caring for the plant and its equipment").[6] The picture of factual integration shown by the record in the instant case plainly substantiates the soundness of this classification, and affords no reasonable basis for creating heretofore unrecognized distinctions for the purpose of construing the broad statutory definition of "production."

Petitioner's position is premised basically upon the assumption that only employees performing the manual work are "manufacturing" or "producing" employees, and that executive, administrative, supervisory, and clerical employees are in the separate and distinct category of persons "necessary to" production. Starting from this premise, fallacious, we believe, petitioner, by a process of "dialectical progression",[7] reasons that the latter employees are "once removed" from production and that any functions which are necessary to their work are "twice removed" from production (Pet. Br. 11). Activities "twice removed", according to petitioner's formula, are not "necessary to" production within the meaning of the statutory language.

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[6] Sixteenth Census of the United States, 1940, Manufactures, Vol. I, pp. 3–4. Data for central administrative-office personnel, although reported and collected separately from data on manufacturing plants, are also included in the Census of Manufacturers. *Id.*, p. 3.

[7] Cf. the opinion of the court below (R. 130).

Whatever merit this formula may have in apparent simplicity, we believe that it imports an awkward artificiality into the problem, and lacks that "practical judgment" which this Court has held must govern in determining what is "necessary to production" within the meaning of the Act. *Armour & Co.* v. *Wantock*, 323 U. S. 126, 130; *Kirschbaum Co.* v. *Walling*, 316 U. S. at 526; see also *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 570; *Overstreet* v. *North Shore Corp.*, 318 U. S. 125, 128. It rests upon too mechanical and unrealistic an assumption, namely, that only the manual, physical work of producing goods is manufacturing or production proper, and that management operations are "once removed" therefrom. It refuses to recognize that the supervisory, management, accounting and clerical functions of a complex modern business enterprise may be—and here are—as indispensable and integral a part of the "production" of the enterprise as are the physical and manual operations. "Machinery and materials may be put to work, workers may labor, but without adequate management to organize and consolidate them into a profitable, co-ordinate whole, to distribute the results of their work effectively, and to govern their operations during performance, this performance may become so uneconomic as to cease entirely."[8] Doubtless the Act contemplates the drawing of a

[8] Lansburgh, R. H., and Spriegel, W. R., *Industrial Management*, 1940, p. 1.

line between activities which constitute production itself and those which are "necessary to" production; but petitioner's effort to draw the line rigidly at the boundary of physical operations is warranted neither by the statutory language nor by policy, nor is it consistent with the facts of industrial organization.

Application of the "practical judgment" called for by the *Armour* and *Kirschbaum* cases, with due consideration to the underlying policy of the Act to respect "the relation between state and national authority" (see *Kirschbaum Co.* v. *Walling*, 316 U. S. at 525), leaves no basis for concluding that the maintenance employees in the building are any the less "necessary" to petitioner's production of goods for commerce than are the maintenance employees in the factory in which the goods are physically manufactured. Respondents' services are performed for petitioner, the Borden Company, which has "no ostensible purpose for being in business except to produce goods for commerce" (see *Armour & Co.* v. *Wantock*, 323 U. S. at 130). As this Court pointed out in the *Armour* case: "More is necessary to a successful enterprise than that it be physically able to produce goods for commerce. It also aims to produce them at a price at which it can maintain its competitive place, and an occupation is not to be excluded from the Act merely because it contributes to economy or to continuity of production rather than to volume of production" (323 U. S.

at 131). The nature of petitioner's industrial organization and its course of business—"its environment and position"—are such that the operation and maintenance of a central office building are practically necessary to the economy, efficiency and continuity of production, and petitioner "actually operates the work [of the maintenance employees in the Borden Building] as part of an integrated effort for the production of goods" (*id.*, at 130).*

If, as we have shown, the executive, supervisory, administrative and clerical activities carried on in the Borden Building constitute an integral part of the production of goods for commerce within the meaning of Section 3 (j), it follows that re-

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* This concentration of certain phases of the productive processes in a home office has become a common practice since the development of large scale multi-unit organizations and particularly with large concerns "producing and distributing dairy products". See the Temporary National Economic Committee's study entitled "*The Structure of Industry*", pp. 165–166. The purpose of such concentration is unquestionably to effect economy and efficiency of production (*id.*, pp. 109–11; see also R. 43–44). The record in this case contains some particularly good illustrations of the vital part played by the central office in the continuity and stabilization of production. For example, the Manufacturing Department in New York is informed by the various factories as to the pounds of milk received daily. "If the supply of milk is inadequate for economical operation, the manufacturing department will issue instructions to some other factory to divert their milk to the manufacturing plant, or will change running instructions of this plant from either condensed to evaporated or some other manufactured product which the factory is qualified to run" (R. 43–44).

spondents are engaged in "occupation[s] necessary to the production" and, therefore, are themselves engaged in production within the meaning of the Act. They, too, are a necessary and integral part of the process of producing food products. Without their services, the nerve center contained in the Borden Building could not effectively direct and control the physical manufacture at the Borden plants and the entire process of manufacturing would be impeded, if not halted. The elevator operators, for example, by petitioner's own admission, are essential to interoffice communication, and frequent conferences between employees on different floors are indispensable to making the decisions governing the manufacturing operations and other phases of the company's business (R. 69). The night watchmen are necessary, obviously, to protect the building and its contents from fire and theft. *Walton* v. *Southern Package Corp.*, 320 U. S. 540. The work of the porters keeping the building clean and habitable is equally indispensable to the efficient performance of the multitude of productive activities there carried on. All are a part of the economic organization devoted to the production of goods.

For these reasons, we think that, if the Borden Building were located on the grounds of one of the Borden Company's manufacturing establishments rather than in midtown New York, it could not be disputed that respondents are covered by the Act.

If this is so, the same result must follow here, for the geographical separation is an obviously irrelevant element in this context. The significant factors are the functional interrelationship between the activities in the Borden Building and the processes of physical manufacture, and the fact that respondents' services are rendered primarily for an enterprise whose exclusive business is the production and sale of goods. The geographical separation between the physical manufacture and the center which controls and directs the physical manufacture is of no more consequence in this case than was the fact in the *Kirschbaum* case that the Kirschbaum and Arsenal Buildings were not owned or maintained by the manufacturing tenants on whose production of goods the case turned.

In view of the close integration between the activities carried on in the Borden Building and petitioner's other activities in the production of goods for commerce, there appears no practical basis for distinguishing between the maintenance employees here and the maintenance employees in the Kirschbaum and Arsenal buildings. The inappropriateness of any such distinction is substantiated by the "larger considerations of national policy, legislative history, and administrative practicalities" which the Court deemed controlling in the *Kirschbaum* case (316 U. S. at 523). On the facts of the present case it is plain

that such considerations dictate a liberal rather than a narrow application of the Act. The functions carried on by petitioner's employees in the Borden Building are not "activities which, if isolated, are only local" (*id.* at p. 521). Rather, they are an integral part of the activities of a national concern, incorporated in New Jersey, with headquarters in New York, carrying on manufacture and related functions all over the United States and in foreign countries. Construing the statutory language in "the context * * * of its implications in the relation between state and national authority" (*id.* at p. 525), we submit that there is no greater, but perhaps less, reason for excluding from the benefits of the Act the employees in this building than for excluding the employees in the Kirschbaum and Arsenal buildings.

The line of cases relied upon by petitioner (Br. 13–14) is of little aid to petitioner's case. In most of them, as petitioner concedes (Br. 14), it did not appear that the tenants were elsewhere engaged in the physical manufacture of goods for commerce, so that the issue revolved solely around the application of the narrower phrase of Section 7—"engaged in commerce." See *McLeod* v. *Threlkeld*, 319 U. S. 491, 493, 501; *Stoike* v. *First National Bank*, 290 N. Y. 195, 200–201 (1943), certiorari denied, 320 U. S. 762; *Convey* v. *Omaha National Bank*, 140 F. 2d 640, 642 (C. C. A. 8),

certiorari denied, 321 U. S. 781. Even in those few cases where, as asserted by petitioner, it did so appear,[10] the opinions make plain that the records before the courts had been constructed with relatively little attention to any showing of the nature of the activities carried on in the building or of the extent of the integration of such activities with the physical manufacture of goods. Possibly this deficiency in the records is to be attributed to the fact that the cases were tried before this Court had established that the scope of coverage under the "in commerce" phrase is narrower than that under the phrase "production of goods;" but whatever the cause, the courts in these cases devoted primary attention to the application of the phrase "in commerce"[11] which, we submit, is not

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[10] *Rucker* v. *First Nat. Bank of Miami, Okl.*, 138 F. 2d 699 (C. C. A. 10), certiorari denied, 321 U. S. 769; *Johnson* v. *Dallas Downtown Development Co.*, 132 F. 2d 287 (C. C. A. 5), certiorari denied, 318 U. S. 790; *Johnson* v. *Masonic Bldg. Co.*, 138 F. 2d 817 (C. C. A. 5), certiorari denied, 321 U. S. 780; *Lofther* v. *First Nat. Bank of Chicago*, 138 F. 2d 299 (C. C. A. 7). It seems scarcely accurate to include the *Dallas Downtown Development Co.* case in this category, in view of the court's statement (132 F. 2d at 289): "None of Appellee's tenants were engaged in the production of goods elsewhere, but some of them were agents for concerns so engaged."

[11] Cf. *Greene* v. *Mills Co.*, 224 N. C. 714, 718–719 1944): "It is not contended that plaintiff employees are engaged in any service necessary to the manufacture or production of goods intended for interstate commerce, since no

the true issue. In any event, in no one of the cases cited was there presented any such strong and decisive picture of integration between the work of office building employees and the physical processes of production as is here before the Court. The cases are factually too remote from the situation in the case at bar to be of value as guides.[12]

Moreover, even if the cited cases were to be regarded as faintly supporting petitioner's contention, it is incorrect to say, as petitioner does (Br. 13), that its contention "is supported by every decision handed down by Circuit Courts of Appeals and United States District Courts excepting the decisions of the Circuit Court of Appeals for the Second Circuit" in the instant case and the *Callus* case. The Circuit Court of Appeals for the Fourth Circuit may, we think, clearly be counted with the court below. See *Burton* v. *Zimmerman*, 131 F. 2d 377 (C. C. A. 4), where in an action by maintenance employees in a 15-story multi-tenant office building in Columbia, South Carolina, the

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manufacture or production of goods was carried on in the office building of the defendant in which they served. But it is contended that plaintiffs' duties in servicing the building bring them within the first named class as being 'engaged in commerce' because some of the occupants of the building which they serviced were so engaged."

[12] Our reference to the factual difference between the Borden Building and the office buildings involved in the cases discussed in the text should not be taken as modifying our criticism of those decisions as precedents even in the case of a multi-tenant office building such as that involved in the *Callus* case.

court stated that the complaint filed would have presented a case on "all fours" with the *Kirschbaum* case if plaintiffs had not abandoned the allegation that tenants of the building were engaged in "production of goods for commerce" as well as "in commerce." [13]

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[13] The court further held that, even under the phrase "in commerce" a full disclosure of the facts might warrant the conclusion that the maintenance employees were covered, depending upon the nature of the business of the tenants and the connection of the plaintiffs' work with that business; it refused to allow dismissal of the complaint, despite plaintiffs' admission that no tenant in the building was engaged in "production of goods" for commerce.

The *Zimmerman* case was decided before *McLeod* v. *Threlkeld*, 319 U. S. 491, and *Stoike* v. *First National Bank*, 290 N. Y. 195, and therefore in its "in commerce" aspect might not be followed now. However, it seems appropriate to suggest that although in the instant case no reliance is placed on the "in commerce" basis of coverage, the factual record here of constant and continuous interstate communication (by teletype, by exchange of detailed information, by distribution of instructions, as well as by the more usual kind and volume of business correspondence) might well support the conclusion that respondents' work, particularly that of the elevator operators (compare *Kirschbaum Co.* v. *Walling*, 316 U. S. at 519), was so closely related to such interstate communication and commerce as to be a part of it. Although the district court found that petitioner was engaged in interstate commerce in the Borden Building (R. 104, 120), both courts below rejected the contention that the maintenance employees were so engaged, on the authority of the *McLeod* and *Stoike* cases (R. 105, 129). We think that the courts below, as well as other courts, may be applying the *McLeod* decision too rigidly, and that the approach of the Circuit Court of Appeals for the Fourth Circuit in *Burton* v. *Zimmerman* represents the sounder view.

B. *Respondents' duties are necessary to the production of labels, photostats, reports and other "goods" physically produced in the Borden Building*

The building is devoted to the production of goods not only by reason of the extensive activities forming an integral part of the manufacture of the milk products and other food products, but also by reason of the labels, photostats, advertising copy, reports, and other "goods" physically produced in the building. The labels, photostats, advertising copy, etc., are "articles or subjects of commerce" within the statutory definition of "goods". *The Western Union Telegraph Co.* v. *Lenroot,* No. 49, this Term, slip opinion, p. 9; see also *Associated Press* v. *National Labor Relations Board,* 301 U. S. 103; *International Textbook Co.* v. *Pigg,* 217 U. S. 91. And these "goods" are "produced" by employees in the building who manually as well as intellectually "work on" and "handle" the materials. *Western Union* case, slip opinion, pp. 9–10. The drafting, writing, photostating, mimeographing, assembling, packaging, etc., of these materials are, we believe, clearly "incidental operation[s] preparatory to putting goods into the stream of commerce" (*ibid.,* p. 10).[14]

[14] The writing and preparation of newspaper and magazine articles, advertising copy, accounts, reports, and other written matter, for shipment in commerce, have been held to constitute "production of goods" in numerous cases arising

CONCLUSION

Whether or not the respondents are covered by the Act by reason of their relationship to the physical production of documents and other ma-

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under the Act, even prior to this Court's decision in the *Western Union* case. *Walling* v. *Sun Publishing Co.*, 47 F. Supp. 180 (W. D. Tenn.), affirmed, 140 F. 2d 445 (C. C. A. 6), certiorari denied, 322 U. S. 728 (newspaper articles); *Bittner* v. *Chicago Daily News Printing Co.*, 7 Wage Hour Rept. 1123 (N. D. Ill. 1944) (newspaper articles and advertising copy); *Berry* v. *34 Irving Place Corp.*, 52 F. Supp. 875 (S. D. N. Y.) (newspaper articles); *Reck* v. *Zarnocay*, 33 N. Y. S. 2d 582 (Sup. Ct. N. Y. Co. 1941) (advertising material, pamphlets, promotion material); *Schineck* v. *386 Fourth Avenue Corp.*, 49 N. Y. S. 2d 872 (N. Y. City Ct. N. Y. Co. 1944) (magazine manuscripts, advertising copy, art work); *Yunker* v. *Abbye Employment Agency*, 32 N. Y. S. 2d 715 (Mun. Ct. N. Y. City 1941) (employment bulletins and information); *Monk* v. *Continental Baking Co.*, 5 Wage Hour Rept. 205 (N. D. Tex. 1942) (bookkeeping records); see also *Lofther* v. *First National Bank*, 48 F. Supp. 692 (N. D. Ill.), where the district court ruled that "goods" as defined in the Act includes written reports and commercial documents, but held that the maintenance employees were not necessary to their production since it was not shown that they "actually handled" such goods. The circuit court of appeals affirmed, but only on the ground that plaintiffs were not "engaged in commerce" under the Act. 138 F. 2d 299, 301 (C. C. A. 7). In a number of other actions brought by maintenance employees in buildings owned and partially occupied by banks, recovery was denied on the assumption that only the "in commerce" basis of coverage was involved, without discussion of the question whether the issuance and preparation of bills of exchange, drafts, securities and other commercial banking instruments constitute "production of goods." *Rosenberg* v. *Semeria*, 137, F. 2d 742 (C. C. A. 9), certiorari denied, 320 U. S. 770; *Convey* v. *Omaha National Bank*, 140 F. 2d 640 (C. C. A. 8), certiorari denied, 321 U. S. 781; *Stoike* v. *First National Bank*, 290 N. Y. 195 (1943), certiorari denied,

terials in the Borden Building, all the activities carried on by petitioner's employees in the building were an integral part of the production of the Borden products. The court below, therefore, correctly held that respondents were within the protection of the Act on this ground.

Respectfully submitted.

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MARCH 1945.

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320 U. S. 762; *Rucker* v. *First National Bank*, 138 F. 2d 699 (C. C. A. 10). In the *Rosenberg* case, for example, the court said that "the sole argument made on their [theemployees'] behalf is that they are 'engaged in commerce' ". 137 F. 2d at 744; to the same effect in the other three opinions, see 140 F. 2d at 641, 290 N. Y. at 200-201, and 138 F. 2d at 702. See also *Building Service Employees International Union* v. *Trenton Trust Co.*, 142 F. 2d 257 (C. C. A. 3); *Blumenthal* v. *Girard Trust Co.*, 141 F. 2d 849, 851 (C. C. A. 3).

Only a few decisions have held explicitly that the drafting and preparation of such materials and documents do not constitute "production of goods" within the meaning of the Act. See *Bozant* v. *Bank of New York*, 8 Wage Hour Rept. 68 (S. D. N. Y. 1944) (brochures, bulletins, reports); *Connelly* v. *Hamilton National Bank*, 184 S. W. 2d 173 (Tenn. Sup. Ct. 1944) (insurance policies, checks, instructions).

U. S. GOVERNMENT PRINTING OFFICE: 1945

SUPREME COURT OF THE UNITED STATES.

No. 688.—October Term, 1944.

The Borden Company, Petitioner, vs. Joseph Borella, et al. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[June 11, 1945.]

Mr. Justice Murphy delivered the opinion of the Court.

Once again, as in *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, we are required to consider the application of the Fair Labor Standards Act of 1938[1] to employees engaged in activities relating to the maintenance and operation of a building.

In the *Kirschbaum* case we held that the Act does apply to such employees working in a loft building in which large quantities of goods for interstate commerce are physically produced. In the instant case, the porters, elevator operators and night watchmen in question work in a 24-story office building in the business district of New York City. The building is owned and operated by the petitioner, the Borden Company, which is a New Jersey corporation engaged in the business of manufacturing milk products and other food products. Petitioner occupies approximately 17 of the 24 floors and 58% of the total rentable area. The remainder of the office space is leased to various tenants, none of which was found by the District Court to produce, manufacture, handle, process or in any other manner work on any goods in the building.[2]

Petitioner has manufacturing plants and factories in both the United States and Canada and its products are sold in large volumes throughout this and other countries. These establishments are admittedly engaged in the production of goods for interstate commerce. The heart of this industrial empire, however, lies in the central office building in New York City. Here the entire enterprise is supervised, managed and controlled.

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[1] 52 Stat. 1060, 29 U. S. C. § 201 *et seq.*

[2] The leasing of space to these tenants is incidental to the use of the building by the Borden Company and we need not consider whether the activities of the tenants are such as to constitute production of goods for commerce.

In this building the directors meet and the corporate officers conceive and direct the policies of the company. Although geographically divorced from the manufacturing plants, employees working in this building dictate, control and coordinate every step of the manufacturing processes in the individual factories. By means of direct teletype wires, they maintain detailed and meticulous supervision of the plants, the local superintendents exercising discretion only in the conduct of routine matters. While no products are actually processed or sold in the building, the purchase of raw materials and supplies, the methods of production, the amounts to be produced, the quantity and character of the labor, the safety measures, the budgeting and financing, the legal matters, the labor policies and the maintenance of the plants and equipment are all directed from this building. Such are the activities of petitioner's central office which is maintained, serviced and guarded by the respondent employees.

The respondents brought this suit against petitioner to recover overtime compensation and liquidated damages, plus reasonable counsel fees. The District Court denied relief, holding that they were not entitled to the benefits of the Act under the rule of the *Kirschbaum* case.[3] 52 F. Supp. 952. The Second Circuit Court of Appeals reversed the judgment. 145 F. 2d 63. We took the case because of the asserted conflict with the decision of the Tenth Circuit Court of Appeals in *Rucker* v. *First Nat. Bank of Miami, Okl.*, 138 F. 2d 699, and because of the importance of the issue as to the application of the *Kirschbaum* doctrine to such facts as are here presented.

Under Section 7(a) of the Act, overtime compensation must be paid to all employees "engaged in commerce or in the production of goods for commerce." As to the latter category of employees it is unnecessary that they directly participate in the actual process of producing goods inasmuch as Section 3(j) provides that "for the purposes of this Act an employee shall be

[3] The District Court also ruled that the preparation and drafting of labels, photostat and advertising material in petitioner's central office did not constitute "production of goods" within the meaning of the Act and that the case in this respect was controlled by McLeod v. Threlkeld, 319 U. S. 491, and Stoike v. First National Bank, 290 N. Y. 195. The Circuit Court of Appeals, however, found it unnecessary to pass upon this phase of the case. We likewise have no occasion to express our views on this matter since the determination of the main issue is sufficient to dispose of this case.

deemed to have been engaged in the production of goods if such employee was employed . . . in any process or occupation necessary to the production thereof, in any State." Our problem thus is to determine whether the respondent maintenance employees are engaged in a process or occupation necessary to the production of goods for commerce so as to come within the ambit of Section 7(a).

The *Kirschbaum* case made it clear that the work of maintenance employees in a building where goods were physically manufactured or processed had "such a close and immediate tie with the process of production for commerce, and was therefore so much an essential part of it, that the employees are to be regarded as engaged in an occupation 'necessary to the production of goods for commerce.'" 316 U. S. at 525-526. The maintenance of a safe, habitable building, with adequate light, heat and power, was deemed necessary to the production of goods for commerce. See also *Walton* v. *Southern Package Corp.*, 320 U. S. 540; *Armour & Co.* v. *Wantock*, 323 U. S. 126. The only distinction between this and the *Kirschbaum* case lies in the fact that here the employees work in a building where production of goods is administered, managed and controlled rather than carried on physically. We hold, however, that this distinction is without economic or statutory significance and that it cannot form the basis for concluding that the respondent employees are engaged in occupations unnecessary to the production of goods for commerce.

In an economic sense, production includes all activity directed to increasing the number of scarce economic goods. It is not simply the manual, physical labor involved in changing the form or utility of a tangible article. Such labor is but an integral part of the coordinated productive pattern of modern industrial organizations. Equally a part of that pattern are the administration, management and control of the various physical processes together with the accompanying accounting and clerical activities. Economic production, in other words, requires planning and control as well as manual labor.[4] He who conceives or directs

[4] In the words of the court below, "As was observed over a century ago, every process of manufacture (indeed for that matter every process by which men can affect the outside world at all) may be resolved into the movement of things in space; and it would be absurd to say that, although what the artisans do in the factory, or the dispatching clerks do upon the shipping platforms, is 'necessary' to 'production,' the directions they receive that govern all the movements they impart, are not 'necessary.'" 145 F. 2d at 65.

a productive activity is as essential to that activity as the one who physically performs it. From a productive standpoint, therefore, petitioner's executive officers and administrative employees working in the central office building are actually engaged in the production of goods for commerce just as much as are those who process and work on the tangible products in the various manufacturing plants. And since the respondent maintenance employees stand in the same relation to this production as did the maintenance workers in the *Kirschbaum* case, it follows that they are engaged in occupations "necessary" to such production, thereby qualifying for the benefits of the Fair Labor Standards Act.

We find nothing in the Act militating against this conclusion. Sections 7(a) and 3(j) both speak of production without attempting to limit its meaning to physical labor. Section 3(j) in particular defines the term "produced" not only in the physical sense of manufacturing, mining and handling but also in the more general sense of producing or "in any other manner" working on goods. In the absence of any contrary evidence we are unable to assume that Congress used the term in other than its ordinary and comprehensive economic sense. Indeed, the fact that Section 13(a)(1) specifically excludes from the provisions of Sections 6 and 7 those employees employed in a bona fide executive, administrative or professional capacity is clearly consistent with the conclusion that these activities are included within the concept of production as that term is used in the Act and that full effect should be given that fact unless otherwise provided. Thus where, as here, the work of employees is essential or necessary to such executive, administrative or professional activities of a productive nature the employees fall within the purview of Section 7(a) even though those directly engaged in such activities are by express exemption precluded from sharing in its benefits.

Nor do we find in the interpretative principles laid down in the *Kirschbaum* case any basis for holding that the respondent employees are not "necessary" to petitioner's production. Since they bear the same relation to production as did the maintenance employees in that case they cannot be considered any less essential to production; nor can this conclusion have any different "implications in the relation between state and national author-

ity." 316 U. S. at 525. Petitioner's industrial organization is such that the operation and maintenance of a central office building is essential to the economy, efficiency and continuity of production. In short, this office is "part of an integrated effort for the production of goods," *Armour & Co.* v. *Wantock, supra,* 130, and the statutory consequences that flow from that fact cannot be avoided.

The judgment below is

Affirmed.

Mr. Justice FRANKFURTER concurs in the result.

Mr. Chief Justice Stone, dissenting.

No doubt there are philosophers who would argue, what is implicit in the decision now rendered, that in a complex modern society there is such interdependence of its members that the activities of most of them are necessary to the activities of most others. But I think that Congress did not make that philosophy the basis of the coverage of the Fair Labor Standards Act. It did not, by a "house-that-Jack-built" chain of causation bring within the sweep of the statute the ultimate *causa causarum* which result in the production of goods for commerce. Instead it defined production as a physical process. It said in § 3(j) "'Produced' means produced, manufactured, mined, handled, or in any other manner worked on" and declared that those who participate in any of these processes "or in any process or occupation necessary to" them are engaged in production and subject to the Act.

In *Kirschbaum Co.* v. *Walling,* 316 U. S. 517, after pointing out that Congress did not undertake to make the Act applicable to all occupations which affect commerce, we held that the services of elevator men and other service employees in a manufacturing loft building, where those services contributed to and assisted the manufacturing process carried on there, were within the Act. But nothing then decided or said seems to me to justify our saying that the elevator men and other maintenance employees in an office building, in which no manufacturing is done, either participate in or are necessary to the manufacturing process, because tenants of its building are executive or administrative officers of a company which does manufacturing elsewhere.

The fact that it is convenient or even necessary for the president of the company to ride in an elevator does not seem to me to meet the requirement of the statute that the occupation must be one necessary to the physical process of production. The statute includes those who are necessary to that process, but it does not also include those who are necessary to them. The manufacturing process could proceed without many activities which are necessary or convenient to the executive officers of a manufacturing company but which do not in any direct or immediate manner contribute to the manufacturing process, as did the services rendered in *Kirschbaum Co.* v. *Walling, supra.*

The services rendered in this case would seem to be no more related, and no more necessary to the processes of production than the services of the cook who prepares the meals of the president of the company or the chauffeur who drives him to his office. Compare *McLeod* v. *Threlkeld*, 319 U. S. 491. All are too remote from the physical process of production to be said to be, in any practical sense, a part of or necessary to it.

I would reverse the judgment.

Mr. Justice ROBERTS joins in this opinion.